No. 88-1316

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMPRESSED GAS CORPORATION - - Petitioner

versus

UNITED STATES STEEL CORPORATION and
JAMES R. KELLEY CO., INC. - - - - Respondents

CORRECTED COPY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Does the Seventh Amendment Prevent the Sixth Circuit from Reversing a Jury Verdict as "Less Plausible"?

II. Does a Conflict Exist Among the Circuits as to Justifiable Reliance Upon a Manufacturer's Advertisements of a Product?

III. Has the Sixth Circuit "Missed the Boat" and Drastically Deviated from This Court's Holdings as to Lost Profits?

IV. Does Title 28 of the United States Code, Section 1961(a) Conflict with the Holding of *Erie R. Co.* v. *Tompkins*?

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No.

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COMPRESSED GAS CORPORATION - - - *Petitioner*

v.

UNITED STATES STEEL CORPORATION and
JACK B. KELLEY CO., INC. - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Compressed Gas Corporation, respectfully prays that a Writ of Certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit, presenting important issues of constitutional law and areas of conflict of law between the various circuits.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix 1, hereto) is reported at 857 F. 2d 346. The judgment is reprinted as Appendix 2 hereto.

2. The April 17, 1987 Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky denying defendants be-

low (respondents) a judgment notwithstanding the verdict and a new trial is not reported. It is, however, reprinted in part as Appendix 4, hereto.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATUTES INVOLVED

Section 1961 of Title 28 of the United States Code, reads in subpart (a) as follows:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshall, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

JURISDICTION

The opinion of the Court of Appeals was rendered on September 21, 1988. Thereafter, a timely petition for rehearing *en banc* was denied by order of the Court of Appeals on November 9, 1988. (Appendix 3, hereto). This petition for writ of certiorari was filed within 90 days of the order denying the petition for rehearing.

The Court's jurisdiction is invoked by petitioner pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Introduction

This case presents a request for review of an Appellate Court's reversal and vacating of a unanimous eight person jury award for over $1.7 million dollars. The verdict was rendered after over thirty witnesses had testified and the jury had deliberated for a day and a half. In reversing the award, the Court of Appeals retried the case factually, from a record that consisted of over eleven hundred pages and made significant erroneous findings of what the evidence at trial had actually been. Further, the opinion below takes positions in conflict with other Circuits. In addition, the Appellate Court panel interpreted a Kentucky State Court decision to undercut the holdings of this Court as to lost profits. Lastly, what appears to be a question not presented before, arises in that the Court is asked to uphold the *Erie* doctrine and ap-

ply a State's post judgment interest rate in a diversity case.

II. Statement of the Facts

On October 27, 1977, a huge high strength steel tube manufactured by U.S. Steel Corporation ruptured, releasing pressurized natural gas. This tube was one of twelve assembled onto a semi-tractor trailer by Jack B. Kelley Co., Inc., for natural gas transportation. In the resulting fireball of released natural gas, two men were killed, three men were badly burned, and one young man received minor burn injuries.

Also, injured by the tube's failure were the property rights of Compressed Gas Corporation, which had leased this natural gas trailer for the delivering of natural gas pursuant to a contract with the City of Elizabethtown, Kentucky. Compressed Gas Corporation's principal, Gobel Mattingly, leased these tube trailers after Jack B. Kelley, himself, showed Gobel the United States Steel brochures, plainly listing these particular type tubes ("3-T" Steel) for natural gas use. Mr. Kelley also showed Gobel the brochures of Jack B. Kelley Co., boldly claiming Jack B. Kelley Co., Inc. to be an expert in natural gas transport. In addition, Jack B. Kelley proūdly pointed out to Gobel the U.S. Steel stampings imprinted on the "3-T" tubes, as evidence that the tubes were fit and proper. After seeing these promotional brochures which claimed the tubes both safe and approved by the U.S. Department of Transportation for natural gas usage, Gobel, on

behalf of Compressed Gas Corporation, entered a lease for future delivery of four natural gas type trailers.

Prior to delivery, U.S. Steel ran a full page ad in the *Wall Street Journal* on two different days in June of 1977, promoting these huge steel tubes as a "natural gas pipeline on wheels". Gobel Mattingly testified at trial that he relied upon these promotional brochures and the *Wall Street Journal* advertisements to persuade a local bank to loan Compressed Gas Corporation the necessary funds to actually start the gas transportation enterprise.

After obtaining the bank loan, Compressed Gas Corporation began the start-up of operations on October 17, 1977. The compressor system was installed by Allied Eastern, Inc., an outfit recommended by U.S. Steel Corporation for this "natural gas line on wheels" concept. U.S. Steel Corporation also recommended the use of Jack B. Kelley Co., Inc.'s tube trailers for this process. Prior to the tubes' failure, U.S. Steel Corporation's promotional department contacted Gobel Mattingly and obtained his permission to photograph the Compressed Gas Corporation's operation for future promotions. However, upon filling one trailer for the first or second time a tube failed, resulting in a deadly fireball.

Upon the tragic failure of the tube, the Kentucky State Fire Marshall investigators along with the Department of Transportation and the Bureau of Standard's experts and other meltallurgist located the point of failure of the tube. The Kentucky State Fire Mar-

shall informed Compressed Gas Corporation in March of 1978 that the transport of natural gas in these type tubes was not safe nor had it ever been approved by the United States Department of Transportation. Up to this point in time, U.S. Steel Corporation and Jack B. Kelley Co., Inc., both had encouraged Compressed Gas Corporation to haul more natural gas in the tube trailers, and never revealed that they knew the process was not approved by the DOT and was not safe when using "3-T" tubes.

Upon the revelation that the tubes were not safe nor approved for natural gas transportation, Compressed Gas Corporation ceased operations with its capital supply spent on defective "3-T" tube trailers.

III. Proceedings Below

Shortly thereafter, an action was filed in the Kentucky State Court for one of the deceased victims. United States Steel Corp. then filed an action in the Federal District Court, under a unique indemnification theory, with jurisdiction founded upon diversity of citizenship, 28 U.S.C., Section 1332(9)(1). Later, the other deceased victim's estate filed a separate federal action and the two were consolidated and the state action held in abeyance. Prior to a summary jury trial in February of 1985, the action was settled as to all but the remaining parties. A summary jury panel of six (an advisory jury that hears only counsel's statements as to what the evidence would be at trial) heard only the product liability theory with the requested damages being over $200,000.00, since no lost

profits testimony was then presented. The summary jury returned a verdict in favor of Compressed Gas Corporation for $200,000.00, and found United States Steel Corporation and Jack B. Kelley, Co., solely at fault.

After the summary jury trial, twenty months later in October of 1986, the parties began a seventeen day jury trial with six jurors and three alternates selected to decide the merits. One prospective member of the panel was excused during the course of the trial due to a death in her immediate family.

Over the seventeen days of trial, testimony was produced from over thirty witnesses called by Compressed Gas Corporation stating that prior to the tragic occurrence the following facts were true: (1) that U.S. Steel Corporation's research labs knew for over ten years that these particular types of tubes were not safe for natural gas transportation (App. 7), (2) that the Department of Transportation had not approved these tubes for natural gas usage (App. 6), and (3) that U.S. Steel Corp. had previously told Jack B. Kelley Co., Inc., in a letter to not use these type tubes for natural gas. (App. 7).

At the trial, U.S. Steel Corp. and Jack B. Kelley Co., Inc. used a joint defense centered around an alleged misinterpretation of the Department of Transportation's regulations. The defense was that U.S. Steel Corp. and Jack B. Kelley, Inc., both thought that "natural gas" and "methane" were interchangeable terms, and since "methane" was approved for use in

these tubes, so then was natural gas. Refuting this defense was the testimony that: (1) U.S. Steel's research labs in 1967 knew that even methane was dangerous in these tubes unless it was purified of any contaminants, (2) that the Department of Transportation in 38 Federal Register Vol. 157 in 1973, stated explicitly that these tubes were not approved for natural gas (App. 6), and (3) that U.S. Steel's metallurgist told Jack B. kelley Co., Inc. in 1971 by letter that natural gas was not "suitable" for use in these tubes and methan could not be pressured into these tubes without purification. (App. 7).

As a second line of defense, Jack B. Kelley Co. produced testimony that it warned all users of this type tube, to use only dry sweet gas. Supposedly, meaning to use gas purified of water vapor ("dry") and having all sulfur gases removed ("sweet"). However, the jury heard testimony from four witnesses, that no such warning was given to them before buying or leasing similar tube trailers from Jack B. Kelley Co., Inc., and that they had dealt directly with Jack B. Kelley.

Also, the proof at trial was that no two witnesses could agree on the definition of dry/sweet natural gas, with several different and conflicting definitions being given. Further, the proof as to the quality of the natural gas injected into the tubes was disputed with the Petitioner producing witnesses stating the gas was good and plentiful.

As to the extent of damages sustained by Compressed Gas Corporation, the jury heard expert testimony that had the tubes been as represented, Compressed Gas Corporation would have profited in the amount of $1.2 million dollars, after paying back over $500,000.00 on the loan secured after the promotional materials and the *Wall Street Journal* advertisements were presented to the bank.

At trial, U.S. Steel Corporation and Jack B. Kelley Co., Inc., presented no independent proof as to the amounts of profit claimed by Compressed Gas Corporation, but instead attacked the weight of the expert's testimony upon cross-examination.

Upon agreement of the parties, the matter was submitted to the remaining panel of eight jurors. The jury was instructed on Compressed Gas Corporation's claims of misrepresentation, negligence, breach of warranties and strict liability. The jury was also instructed on U.S. Steel Corp.'s and Jack B. Kelley Co., Inc.'s claim of negligence on Compressed Gas Corporation's part, and Jack B. Kelley Co., Inc.'s claim of indemnification under the leasing agreement.

After deliberating for a day and a half, a unanimous jury verdict was returned, placing 70% of the fault on U.S. Steel Corp., 30% on Jack B. Kelley Co., and no fault on Compressed Gas Corp., awarding the Plaintiff the entire sum requested being a total of $1,766,271.20 in damages. Also, the jury rejected Jack B. Kelley Co., Inc.'s claim for indemnification and negligence on the part of Compressed Gas Corp.

In overruling the defendants' motions for judgment, notwithstanding the verdict, and for a new trial, the trial judge after having reviewed the trial record and his trial notes found that contested factual issues existed and that "competent evidence" supported the jury verdict and he wouldn't disturb it. (App. 4, p. 26a).

However, upon appeal, the Sixth Circuit Court of Appeals panel rejected the testimony of Plaintiff's witnesses, reweighed the proof to find only the defense witnesses to be credible, and misidentified the evidence and based their findings of fact on the wrong pages of the promotional brochures all to arrive at the new verdict that the appeals' panel felt appropriate, but which the jury had rejected. The Court of Appeals did not hold that the jury's verdict was not supported by substantive evidence, but instead rejected the jury's verdict as being only "less plausible."

In reversing as to lost profits, the Court of Appeals held that the trial judge had misinterpreted the controlling state law, but did not find his interpretation thereof to be "an abuse of discretion or clearly erroneous." The Court of Appeals, by holding that lost profits must be proven with "reasonable certainty" rejected Compressed Gas Corporation's expert's proof thereon without any evidence to the contrary. The Appeals panel denied lost profits in a misapplication of both the prevailing state law and the precedents of this court by failing to note the wrongdoer bears the risk of uncertaintude, not the innocent victim.

Lastly, the appeals panel applied the federal rate of interest to the judgment herein as found in 28 U.S.C.

Section 1961(a). It is Compressed Gas Corporation's contention that post judgment interest is a substantive matter, and that a state's post judgment rate applies in a pure diversity case.

A timely petition for rehearing *en banc* was filed and the denial of that petition leads to this application for a Writ of Certiorari.

REASONS FOR ALLOWANCE OF WRIT

ARGUMENT I—Does the Seventh Amendment Prevent the Sixth Circuit From Reversing a Jury Verdict as "Less Plausible"?

The first and foremost reason for granting review of this case is that the Sixth Circuit has greatly departed from the accepted and usual course of judicial proceedings by ignoring the correct standard of review of a jury verdict, and invading the jury's right to determine the facts. The trial below started in October and ended in December of 1986. The jury heard testimony from over thirty witnesses. The crucial testimony as to the fraud claimed, including misrepresentation of fact and reliance thereon, came from live witnesses.

Further, Petitioner's jury verdict of lost profits was buttressed greatly by the cross-examination of Don Fowler, partner in a successful similar natural gas enterprise. Only a jury could by law, decide the basic issue in all trials, i.e., "who was telling the truth?" Here, all the evidence didn't point to one inference or to just one conclusion. But, there was sufficient evidence to make it a question of fact for the jury, and

they alone could "weigh the contradictory evidence and inferences and draw the ultimate conclusion as to the facts." *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944) as cited in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 701, 82 S.Ct. 1404, 8 L.Ed. 2d 777 (1962).

Upon a review of the opinion below, this court must be struck with the Appellate Court's redetermination of fact in violation of the Seventh Amendment. Specifically, the panel's finding that there was no evidence that Jack B. Kelley Co., Inc., had an evil motive or "intent to deceive" upon the facts presented. (App. 1, p. 8). The Appeals' panel boldly states that in fraud actions the scale of proof requires "a presumption of honesty against fraud claims." The panel then reweighs the proof from the cold record on appeal, and acknowledges that the jury found the fraudulent intent. (App. 1, p. 8). Yet, the Court of Appeals overturns the unanimous eight person jury verdict on the basis that the proof at trial is more consistent with honesty. (App. 1, p. 8). In redetermining the fraud issue, the Sixth Circuit disregards the holding of this Court in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 70 S.Ct. 177, 94 L.Ed. 150 (1949) which, at page 179 held:

> Findings as to design, motive and intent with which men act, depend peculiarly upon the credit given to witnesses by those who see and hear them.

In addition, the Sixth Circuit rejects its own case law and policy of being hesitant to overturn jury ver-

dicts as expressed in *Pratt* v. *National Distillers & Chemical Corp.*, 853 F. 2d 1329 (6th Cir. 1988) at page 1337, which reads:

> . . . . a reviewing court should not lightly overturn a jury verdict: "A reviewing court should be particularly loathe to disturb a jury's findings on an issue, such as intent, which is so intimately bound to the interpretation of facts and the demeanor of witnesses." This court has expressed the same hesitation toward tampering with jury findings. *Gillham* v. *Admiral Corp.*, 523 F. 2d 102, 109 (6th Cir. 1975), cert. denied, 424 U.S. 913, 96 S.Ct. 1113, 47 L.Ed. 2d 318 (1976) (to overturn a jury verdict, evidence must be such that "reasonable minds could not differ as to the conclusions to be drawn from the evidence"). We are not to reweigh evidence to reach our own conclusions about the correctness of a jury's decision; our task is simply to determine whether reasonable jurors could, under any theory submitted to them, have resolved the dispute as they did. *Thompson* v. *Bass*, 616 F. 2d 1259, 1267 (5th Cir.), cert. denied, 449 U.S. 982, 101 S. Ct. 399, 66 L.Ed. 2d 245 (1980).

Such a disregard for a jury verdict cannot be allowed to stand as precedent as long as the Seventh Amendment guarantees the right to a jury trial. This matter if not reviewed, will stand for the redetermination of contested facts by three judges, who don't have the benefit of seeing the witness face to face. If left untouched, the published opinion below will alter this Court's position of nearly one hundred years, found in *Washington & G. R. Co.* v. *McDade*, 135 U.S. 554, 571-572, 10 S.Ct. 1044, 1050, 34 L.Ed. 235 (1890), that:

> . . . . "as long as the jury is made the tribunal to disputed questions of fact, then fact questions are for the jury's determination. The jury alone determines contested facts."

It should be noted that the Sixth Circuit does not state the standard of review they followed in their published opinion. The simple reason for this exclusion is that the standard as stated above, simply requires a determination of "whether reasonable jurors could, under any theory submitted to them, have resolved the dispute as they did"? *Thompson* v. *Bass, supra.* In their opinion, the Sixth Circuit's panel admits that the reasonable minds of the jury did *find* the theory of Compressed Gas Corporation "convincing." (App. 1, p. 8). If the Court of Appeals had enunciated and followed their own standard of review, it could not have vacated the verdict, but would have affirmed it.

Obviously, reviewing Appellate Courts cannot from a cold truncated record, determine the facts of a lengthly complicated contested case. They are likely to misconstrue the evidence, whereas jurors (here, eight decided the facts) have the ability to review the exhibits in their deliberations and to discuss amongst themselves the evidence that they actually heard. By the use of several jurors our justice system prevents clearly erroneous findings of fact. Here, one has occurred, because the Appellate Court tried to reconstruct the evidence entirely and failed in doing so.

Certiorari should be granted and the opinion of the Court of Appeals vacated because the Appellate opinion rest in part upon the wrong evidence. The Petitioner's principal, Gobel Mattingly, testified and showed the jury page number 16 of a United States Steel brochure (App. 5), which he says he relied upon in leasing the tube trailer, getting the bank loan and injecting the gas on the day of the tragic failure. The Sixth Circuit found that the brochure didn't even refer to natural gas and therefore rejected the reliance testimony of Petitioner. The Court of Appeals' opinion relies upon and refers to the wrong page of the U.S. Steel Corporation's brochure! The jury saw page number 16, which appeared in the Joint Appendix at page 483. The Court of Appeals acting as fact finder, relied upon pages number 477 and 569. (App. 1, p. 12a). This erroneous reinterpretation of the evidence is just the evil intended to be avoided by the Seventh Amendment's restriction of reviewing courts.

Lastly, as a matter of law, the evidence existing in the record required the jury verdict be upheld. The Court of Appeals reversed on the premise that two elements of misrepresentation were wanting. These being, (1) no misrepresentation, and (2) no reliance. In so concluding, the Appeals' panel ignored the proof that U.S. Steel Corp. and Jack B. Kelley Co., Inc., knew that these type tubes were not safe nor approved for natural gas, as stated in the Federal Register Volume 38 No. 1507, August 18, 1973, (App. 6). Both United States Steel Corporation and Jack B. Kelley Co., Inc. are charged with legal notice of the contents of the Fed-

eral Register, *Federal Crop Ins., Corp. v. Merrill, et al.*, 68 S. Ct. 1, 332 U.S. 380, 92 L. Ed. 10 (1947), and *Moody v. United States*, 774 F. 2d 150, 156 (6th Cir. 1985), cert. denied 107 U.S. 65 (1986).

Further, the research records of U.S. Steel Corporation and their correspondence with Jack B. Kelley Co., Inc., in 1971 (App. 7) clearly supports the jury's finding, that they knew these tubes were not safe nor approved for natural gas, when Compressed Gas Corporation was defrauded.

While the page mixup is the clearest error of fact made by the Sixth Circuit, it is not the only one. Over twelve other erroneous factual mis-statements are made in its opinion. To delineate them all would consume the petitioner's entire page allowance herein.

A review of the Sixth Circuit's opinion is mandated to uphold the standards of review of motions for a judgment notwithstanding the verdict and a new trial, since if there is a question of fact raised, the motions must be denied and the Court may not weigh the evidence, not pass on its credibility, nor substitute its judgment for that of the jury. In passing on the motion, the Court must view the evidence in the light most favorable to the jury's verdict, drawing all reasonable inference in support thereof from the evidence. *National Polymer Products v. Borg-Warner Corp.*, 660 F. 2d 171, 178 (6th Cir. 1981), which goes on to hold:

> Judgment notwithstanding the verdict is not proper unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict. It should not be granted if there is a

> conflict in the evidence, and credibility of evidence is not to be considered in passing on a motion for judgment. *National Polymer Products* v. *Borg-Warner Corp.*, 660 F. 2d 171, 178 (6th Cir. 1981).

To allow the Court of Appeals to review and reweigh, as well as create and ignore evidence, is a clear violation of the J.N.O.V. standards of review and the Seventh Amendment.

ARGUMENT II—Does a Conflict Exist Among the Circuits as to Justifiable Reliance Upon a Manufacturer's Advertisements of a Product?

A split of authorities exist between the circuits as to what constitutes reliance as an element of a fraud claim. In their opinion, the Sixth Circuit held that the use of respondents' promotional material to obtain the bank loan is only "third party" reliance and not actionable for fraud. (App. 1, pgs. 10-11). In the Eighth Circuit a use of similar materials to obtain a loan was held to constitute reliance in a fraud case. *Cruces* v. *KFC Corp.*, 729 F. 2d 1145 (8th Cir. 1984) appeal after remand, 768 F. 2d 1547 (8th Cir. 1987).

At trial, the jury heard testimony that the tubes were proudly promoted by Jack B. Kelley Co., Inc., as being U.S. Steel made. In fact, the testimony was that the stampings on the tubes, certifying their proper manufacturer, were eagerly shown to Gobel Mattingly by Jack B. Kelley. Gobel testified that he put stock in the stampings and the U.S. Steel Corp.'s name imprinted on the tubes. In the 10th Circuit, the Court found justifiable reliance existed when a supplier used

the name of a well known manufacturer in promotional brochures. *Mattingly, Inc.* v. *Beatrice Foods Co.*, 835 F. 2d 1547 (10th Cir. 1987). Surely it should exist, when a supplier uses the product as a display sample of quality.

Another conflict exists as to whether the representations made after the trailer lease was signed, but before the bank loan was obtained, can constitute reliance. In *Wagstaff* v. *Protective Apparel Corp. of America*, 760 F. 2d 1074 (10th Cir. 1985), representations made after the contract was signed, constituted an element of a "fraud claim." While the Eighth Circuit adopts the position of the Restatement (Second) of Torts, Section 546, that whether "reliance is a substantial factor in determining the cause of conduct that results in the loss" is purely a jury question. *Sedco International S.A.* v. *Cory*, 683 F. 2d 1201 cert. denied, 459 U.S. 1017, 103 S.Ct. 379, 74 L. Ed. 2d 512 (1982).

Contrary to the opinion below, the courts have recognized that whether a post-sale representation may be "relied upon" becomes a jury question as in *Downie* v. *Abex Corp.*, 741 F. 2d 1235 (10th Cir. 1984). In *Bigelow* v. *Agway, Inc.*, 506 F. 2d 551 (2nd Cir. 1974), the seller's post-sale reassurances of the fitness of the product for the use intended, where actionable as relied upon warranties. However, the Sixth Circuit below held that the reassuring letter of Jack B. Kelley, holding these tubes out as approved and proper for natural gas use was held to be unworthy of reliance, constituting only a misrepresentation of law. (App. 1, p. 8).

Again, as stated above, the Sixth Circuit improperly reviewed, reweighed, and realigned the evidence as to reliance. Most importantly, they failed to acknowledge the testimony of Petitioner's principal that supports the fraud award. Gobel Mattingly testified that he didn't read the whole promotional brochure, but referred the jury to a specific page he did read, which plainly held out the tube in question as safe, proper and approved for natural gas use. In the greatest deviation from the standards of appellate courts, the Sixth Circuit's opinion refers to the brochure as "referring to several gases, but no natural gas." (App. 1, p. 11). The Court of Appeals has referred to the *wrong pages* of the brochure. The jury heard testimony from the petitioner's witness, that the page he was shown before leasing the trailers was page 16, Joint Appendix, p. 483 *not* page 477 as mis-stated by the Sixth Circuit. (App. 1, p. 11).

If the Sixth Circuit's published opinion below is allowed to stand, then the same catalog statement could be relied upon to create a warranty claim under the Uniform Commercial Code, *Overstreet* v. *Norden Laboratories, Inc.*, 669 F. 2d 1286 (6th Cir. 1982) but, is not worthy of "reliance" under a fraud theory.

In *Overstreet* v. *Norden Laboratories, Inc., supra,* the statements in the brochure promoting a new product were relied upon and no investigation of the claims in the material was required. But here, the Court of Appeals rebukes Compressed Gas Corp. for not investigating the claims further and for claiming reliance upon the Wall St. Journal advertisements. Since it is a

clear violation of the Seventh Amendment, to allow the same issue (reliance upon promotional materials and advertisements) to be treated differently, depending on whether the claim is based on fraud or warranty, the holding below must be vacated. *Connell* v. *Sears Roebuck & Co.*, 722 F. 2d 1542 (Fed. Cir. 1983).

ARGUMENT III—The Sixth Circuit Has "Missed the Boat" and Drastically Deviated From This Court's Holdings as to Lost Profits.

In vacating the $1,137,154 dollars of lost profits awarded, the Sixth Circuit relies upon its interpretation of a State Court decision, *Pauline's Chicken Villa, Inc.* v. *KFC Corporation*, Ky., 701 S.W. 2d 399, 401 (1985). The Appeals' panel felt *Pauline's Chicken Villa, supra*, created nine factors that should exist to recover lost profits (Footnote #2, App. 1, pgs. 12-13). The Appeals' panel then goes on to hold that under *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 551, 51 S. Ct., 75 L. Ed. 5, 44, lost profits were "too speculative" to be recovered here. Both these premises are violations of this Court's holdings on lost profits, because (1) the speculation standard applies to the *cause* of damages not the amount claimed, and (2) *Pauline's Chicken Villa, supra*, cannot create mechanical rules that undercut this Court's holdings on lost profits.

A review of the Court of Appeals' decision is necessary to correct its deviation from the Supreme Court's holdings in *Story Parchment, supra*, and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S. Ct. 574,

90 L. Ed. 652 (1946). This Court has held that lost profits are to be denied only when the cause of the damage is uncertain, not when the exact amount of damage is uncertain. In *Story Parchment* v. *Paterson Parchment Paper Co., supra,* as this Court stated:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage, and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong, but only uncertain in respect of their amount.

It is not contested that the respondents caused the damages, since the jury verdict as to their fault alone was upheld. But, the Court of Appeals rejected the holding of *Bigelow* v. *RKO Radio Pictures, Inc., supra,* 66 S. Ct. at 578, which holds that "the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his wrong has created". The Sixth Circuit's published opinion ignores this concept and vacates the recovery of the lost profits, since the amount is "too speculative". (App. 1, p. 14).

Such ruling contradicts *Bigelow* v. *RKO Radio Pictures, Inc., supra,* at 66 S. Ct. 578, and must be vacated since:

> The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.

Apparently the Sixth Circuit felt that the nine factor listed in *Pauline's Chicken Villa, supra,* 701 S.W. 2d 401-402, had to exist in this case for a recovery of lost profits. The error of this thought is apparent upon a reading of the *Pauline's Chicken Villa* holding. Moreover, the use of the factors listed in *Pauline's Chicken Villa, supra,* and the facts the Court created out of the record on appeal, contradict the holdings of this Court and other Circuits. Application of the nine factors violates this Court's mandate found in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962) that no mechanical formula exists for recovery of lost profits, because a rigid formula would provide the very means to escape the rules of its sanction.

Plainly stated, the Sixth Circuit missed the boat, as to what barrs the recovery of profits as "speculative" and what type of proof is needed to support such a recovery. Unlike the Sixth Circuit believes, it is anticipated that estimates, inferences and some speculation go into arriving at the amount of lost profits in any case. As stated in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969):

> . . . "the jury may make a just and reasonable estimate of the damage based on relevant data, and

> render its verdict accordingly. In such circumstances, 'juries are allowed to act on probable and inferential as well as direct and positive proof'. *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra,* 282 U.S. 561- 564, 51 S. Ct. 250, 251, 75 L. Ed. 544; *Eastman Kodak Co.* v. *Southern Photo Material Co.,* 273 U.S. 359, 377-379, 47 S. Ct. 404, 405, 71 L. Ed. 684. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grevious the wrong done, the less likelihood there would be of a recovery."

Also directly opposed to the Sixth Circuit's opinion is the holding of the Fifth Circuit in *Continental Oil Company* v. *S.S. Electric,* 431 F. 2d 391 (5th Cir. 1970), which upheld the award of lost profits in the oil and gas markets, which the Sixth Circuit found "unpredictable". (App. 1, p. 13). Opposed is the holding of the Seventh Circuit in *Locklin* v. *Day-Glo Color Corp.,* 429 F. 2d 873, 879 (7th Cir. 1970), that even anti-trust damages of lost profits may be reasonable assumptions. Opposed is the holding of the Tenth Circuit in *Randy's Studebaker Sales, Inc.* v. *Nissan Motor Corp.,* 533 F. 2d 510, 517-518 (10th Cir. 1976), which held that future damages don't have to be mathematically precise, may be based on calculations founded upon records put into evidence, and that they may even be calculations over 10 years into the future.

Further, opposition is found in *Howard Industries, Inc.* v. *Rae Motor Corp.*, 293 F. 2d 116 (7th Cir., 1961), which states that the trend is for Court's to liberalize the rules of proof when the fact of damage is clear.

Supposedly supporting their finding of speculative damages, is the Sixth Circuit's factual statement that Don Fowler, the president of a similar gas transport operation, made little or no profit. (App. 1, p. 13). Again, the Sixth Circuit has invaded the jury's domain by determining the credibility of a witness. This is guaranteed to the jury alone under the Seventh Amendment. Because, at trial Mr. Fowler admitted on cross examination, that over the time in question, his similar enterprise had grossed over $14 million dollars, had created subsidiary corporations, and had expanded to natural gas transportation in other countries. Hardly the same factual scenario painted by the Sixth Circuit.

Again, reweighing the evidence, the Court of Appeals stated that Don Fowler's similar enterprise, Texas Gas, never operated in Kentucky because the gas was of such poor quality and insufficient quantity. (App. 1, p. 14a). This fact was disputed by an offer to transport similar Kentucky gas made by the same Mr. Fowler to another corporation prior to the tube failure. The jury was privy to the cross-examination of Mr. Fowler, and his admission that he had bid on the transport of Kentucky gas. The jury's finding infers a rejection of Don Fowler's direct testimony, which for some reason the Sixth Circuit's three judges' found credible only on direct examination.

At best, the facts as found by the Sixth Circuit go to the amount of lost profits not the right to recover the same, under *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra,* and *Bigelow* v. *RKO Radio Pictures, Inc., supra.* After the trial judge ruled the testimony of Dr. Monath as to lost profits was helpful for the jury, then the jury alone could determine what weight to assess to his figures. *Mannion* v. *Intern Mfg., Co.,* 650 F. 2d 846 (6th Cir. 1981). Fed. Rules of Evidence 702, 703. Because the jury had a choice between two permissible views of the weight of this evidence it is not a clearly erroneous finding for the jury's finding to not be the same as the reviewing court. *United States of America* v. *Yellow Cab Co.,* 388 U.S. 338, 342 70 S. Ct. 177, 94 L. Ed. 150 (1949). The Sixth Circuit's opinion should be vacated since it argues the weight of the evidence on lost profits in the guise of presenting a question of law. Thus, invading the jury's domain as to a resolution of disputed facts by this Court in *Lavender* v. *Kurn,* 327 U.S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916 (1946) which reads:

> Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute, by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is

free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

ARGUMENT IV—Does 28 U.S.C. Section 1961(a) Conflict With the *Erie* Doctrine in Diversity Cases?

By application of the post judgment interest rate found in 28 U.S.C. Section 1961(a), the Court of Appeals failed to adhere to doctrine of *Erie R.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938), that Congress has no power to declare substantive rules of law. Since the case of *Massachusetts Benefit Association* v. *Miles,* 137 U.S. 689, 691, 11 S. Ct. 234, 235, 34 L. Ed. 834, 835 (1891), the question of the rate of post judgment interest has been seen as "local law" set by state statute. Since *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, 498, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477 (1941), this Court hasn't allowed the removal of a state action to a Federal Court to "disturb equal administration of justice in coordinate State and Federal Courts sitting side by side".

Yet, Section 1961(a) of Title 28 of the U.S.C., now provides for different rates of interest on a judgment, depending upon whether the "accident of diversity" exists between the parties. It is an invasion of the states' rights and in violation of the *Erie* doctrine to force a federal rate of interest upon the damages awarded in a diversity action.

CONCLUSION

A writ of certiorari should be granted to preserve the right to a jury trial as guaranteed in the Seventh Amendment. Upon a review of the Sixth Circuit's opinion, it is readily apparent that the jury's verdict was reversed, because the Appeals' panel improperly retried the case. Our justice system rests upon a trial by a jury to determine facts. An amazing effect occurs when a witness testifies under oath. Some speak hesitantly or wiggle with each answer, others look the jury directly in the eye and don't waste words. The demeanor and manner of a witness is crucial for a determination of his credibility. It is not always what is said, as much as how it is said that allows a jury to believe or disbelieve a witness. This is the heart of our justice system. By reversing the jury's verdict as "less plausible", the Sixth Circuit has cut out the heart of the justice system.

Also, a review is necessary to correct the Sixth Circuit's misinterpretation of the relationship between speculation and lost profits as stated by this Court. No Court has ever held that a wrongdoer may benefit from the injury he has inflicted on others. Yet, the Sixth Circuit has rewarded the Respondents for their total destruction of a business enterprise, by refusing the claim for lost profits.

Thirdly, a review should issue to clear up the conflicting opinions as to what reliance may be placed on advertisements. This Court alone can clarify the law.

Lastly, a review should issue to resolve the disparity in judgments created by Title 28 U.S.C., Section 1961 (a). Obviously, it is unjust for a party to recover vastly different rates of interest on a judgment, depending merely upon the Defendant's state of residence. At present, the *Erie* doctrine is eroded by the Appeals Court's opinion.

For these reasons and those outlined in the arguments above, this Court is asked to grant a writ of certiorari, vacate the Court of Appeals for the Sixth Circuit's opinion and reinstate the jury's verdict.

Respectfully submitted,

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APPENDIX

APPENDIX 1

Nos. 87-5535/87-5608

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COMPRESSED GAS CORPORATION, INC., - *Plaintiff-Appellee Cross-Appellant,*

v.

UNITED STATES STEEL CORPORATION and JACK B. KELLEY, INC., - - - *Defendants-Appellants Cross-Appellees.*

On Appeal From the United States District Court for the Western District of Kentucky
Decided and Filed September 21, 1988

Before: KEITH, KENNEDY and NELSON, Circuit Judges.

I.

KEITH, Circuit Judge. Defendants United States Steel Corporation ("USS") and Jack Kelley appeal, and plaintiff Compressed Gas Corporation ("CGC") cross-appeals, the jury verdict for plaintiff in this diversity action resulting from the explosion of a steel cylinder. The "3T" cylinder, manufactured by defendant USS and leased by defendant Jack B. Kelley, Inc., ("Kelley") ruptured while being filled with natural gas apparently containing certain contaminants. The explosion killed two persons, injured four others, and caused property damage. The personal injury

and wrongful death claims were adjudicated in a separate lawsuit. At trial in this action, CGC claimed that it had been defrauded by the misrepresentations of USS and Kelley that the cylinders were safe for transporting natural gas and approved for that purpose by the United States Department of Transportation ("DOT"). CGC also made a products liability claim for a defective cylinder and failure to warn. This appeal focuses on the property damage resulting to plaintiff CGC from the rupture of the cylinder.

For the reasons set forth below, we believe the jury was improperly permitted to find against USS and Kelley on a theory of fraudulent misrepresentation, and was also improperly permitted o include CGC's alleged "lost profits" in the damages award. Because the jury reached a damages verdict that apparently was calculated upon a theory of fraudulent misrepresentation, and which also incorporated CGC's alleged lost profits, the verdict against the defendants must be vacated. We must therefore reverse on those issues and remand the entire case to the district court for a new trial. Further, we believe that an incorrect rate of interest was applied to the judgment below. We affirm on all of the remaining issues.

This case was tried as a summary jury trial on February 13, 1985, which resulted in a verdict of $200,000 against defendants USS and Kelley. The case was then reassigned to the Honorable Ronald Meredith of the Western District of Kentucky, who allowed additional discovery. A full trial on the merits took place on October 21, 1986. On December 11, 1986, the jury returned a verdict, apportioning fault at 70% against USS and 30% against Kelley, and awarding $1,766,271.20 in damages to CGC. The district court set the post-judgment interest rate at 12% to be compounded annually. The district court denied USS's and Kelley's motions for judgment notwithstanding the verdict and new trial.

Defendants USS and Kelley present a host of issues on appeal. They urge: 1) that the absence of proof of fraudulent misrepresentation entitled them to a directed verdict on the question of whether they fraudulently induced CGC to lease their steel cylinders; 2) that the jury instructions impermissibly allowed a solitary instruction on damages for two separate theories of liability; 3) that there was insufficient evidence to support a jury instruction on lost profits; 4) that Kentucky law requires the application of contributory rather than comparative negligence to products liability cases; 5) that the trial court abused its discretion in allowing CGC to conduct additional discovery following the summary jury trial; 6) that the trial court erred in applying the 12% post-judgment interest rate; and 7) that CGC's agreement to indemnify Kelley from all liability arising from the use of leased cylinder trailers entitled Kelley to a directed verdict on claims against him. On cross-appeal, CGC argues that punitive damages should have been submitted to the jury.

II. FACTS

Gobel Mattingly, the retired owner of a highway construction company, incorporated CGC for the purpose of hauling natural gas from wells to commercial pipelines. A five-paragraph trade journal article describing the successful gas transportation operation of Texas Gas Transport ("Texas Gas") inspired Mattingly to enter the gas transportation business in August, 1976. When he incorporated CGC, Mattingly had no training or experience in gas transportation or compression. Joint Appendix at 927.

Mattingly visited Jack Kelley's Texas facilities to lease the special trailers that hauled the USS steel cylinders used in transporting natural gas. Kelley was one of four or five principal purchasers of USS seamless steel cylinders. He would purchase the cylinders from USS and fabricate

trailers for them. Each trailer could transport twelve cylinders. As well as using the trailers to transport a variety of compressed gases, Kelley sold or leased the cylinder trailers to others. Mattingly executed a trailer lease with Kelley in February, 1977.

On October 27, 1977, CGC's compressor station was damaged when a 3T seamless steel cylinder manufactured by USS ruptured while being filled with natural gas apparently tainted by the contaminants hydrogen sulfide and water. CGC repaired its property damage for $45,307.54.

The experts who testified at trial generally agreed that the explosion of the steel cylinder would not have occurred if hydrogen sulfide and water had not combined with natural gas in the cylinder. Natural gas is odorless and flammable, and is composed principally of methane. Sometimes natural gas, when extracted from the ground, contains contaminants such as hydrogen sulfide. Gas that does not contain significant hydrogen sulfide contamination is labeled "sweet" gas, while contaminated gas is called "sour" gas. In the gas industry, contaminated gas is considered dangerous because hydrogen sulfide in the presence of water will embrittle high-strength steel, causing it to fail under stress within hours. This is known in the industry as "sulfide stress cracking," and is recognized and understood. For sulfide stress cracking to occur, three factors must be present: hydrogen sulfide, water and susceptible metal. At the time of the accident CGC had neither installed a dehydrator nor any sulfide removal equipment at its gas wells, unlike most other gas well operations in the United States.

When Mattingly and Kelley met to arrange the lease of the 3T cylinders and trailers, Kelley testified that he told Mattingly that Mattingly's "gas can't have any moisture in it or no hydrogen sulfide." Joint Appendix at 800. Kelley testified that he repeated this warning to Mattingly during Mattingly's second visit to his offices. Mattingly testified

that "someone" had advised him that the gas had to be dry to be hauled safely in the 3T tubes, but he was not sure that that person was Kelley. *Id.* at 919. Mattingly saw a Kelley brochure which promoted the cylinder trailers, but never read the DOT regulations that were on the front of the brochure. In September, 1977, at CGC's request, Kelley sent Mattingly a copy of the DOT regulations setting forth the gases suitable for transport in 3T cylinders. Mattingly testified that again he did not read the regulations sent to him. *Id.* at 924.

Mattingly said that he showed Kelley an analysis of a gas well that indicated the gas was sweet. He did not, however, have the wells tested for hydrogen sulfide or moisture. *Id.* at 731. The test that he had showed Kelley was over a year old, and contained no moisture reading. Tests conducted on the wells following the accident revealed high concentrations of hydrogen sulfide and moisture. *Id.* at 615-16, 1043-45.

Aside from his three visits with Kelley, Mattingly's contacts with USS itself were scant. In September, 1976, while visiting the Kelley offices, Mattingly saw but did not read a USS brochure, and instead only "looked at the pictures." *Id.* at 924. In June of 1977, Mattingly saw an advertisement in the *Wall Street Journal* promoting USS cylinders for use in natural gas transportation. The advertisement gave no specific cylinder identification or detailed technical information, but gave a telephone number and invited inquiries from persons interested in further information. CGC never called the number in response to the advertisement.

Prior to the accident, neither USS nor Kelley ever had any complaints that, or knowledge that, any high pressure jumbo cylinder had ruptured in service. *Id.* at 983. As of the date of the accident, USS had produced over 15,000 jumbo steel cylinders. The 3T cylinder had transported

approximately 48,000 loads of natural gas without difficulty. According to testimony at trial, never in USS's history had one of its cylinders ruptured in any kind of service until the explosion at issue here. *Id.*

III. ANALYSIS

A. *The Fraud Claims*

CGC claims that USS and Kelley fraudulently induced CGC to use the 3T cylinders by "misrepresenting" the cylinders as safe containers for natural gas transportation, and by misrepresenting that the DOT regulations authorized natural gas transportation in 3T cylinders.

Under Kentucky law, which governs this diversity action, the plaintiff must establish six elements to sustain a fraud claim. There must be: 1) a material misrepresentation, 2) which is false, 3) which was known to be false, or made recklessly, 4) made with inducement to be acted upon, 5) which is acted upon in reliance thereon, and 6) causes injury. *Wahba* v. *Don Corlett Motors, Inc.*, 573 S.W. 2d 357, 359 (Ky. Ct. App. 1978). Kentucky law also recognizes a presumption of innocence and honesty against fraud claims. *Terrill* v. *Carpenter*, 143 F. Supp. 747, 753-54 (E.D. Ky. 1956), *aff'd*, 249 F. 2d 142 (6th Cir. 1957); *T.M. Crutcher Laboratory* v. *Crutcher*, 288 Ky. 709, 720, 157 S.W. 2d 314, 319 (1941). The plaintiff bears the burden of proving fraud by clear and convincing evidence. *Brooks* v. *United Kentucky Bank*, 659 S.W. 2d 213, 216 (Ky. Ct. App. 1983); *Wahba*, 573 S.W. 2d at 359; *Sanford Construction Co.* v. *S. & H. Contractors, Inc.*, 443 S.W. 2d 227 (Ky. 1969). Under Kentucky law, a motion for a judgment notwithstanding the verdict is subject to a "more than a scintilla" of evidence rule; that is, we will reverse the denial of a judgment notwithstanding the verdict if we do not find evidence of fraud of probative value having fitness to induce conviction in the minds of reasonable persons. *Wadkins'*

Adm'x v. *Chesapeake & Ohio Railway Co.*, 298 S.W. 2d 7, 9 (Ky. 1956). We find that plaintiff has not presented "more than a scintilla of evidence" toward meeting his burden of proof.

1. *No Material Misrepresentation Known to be False or Made Recklessly.* CGC argues that USS and Kelley falsely represented that the steel tubes were safe for "natural gas." Indeed, the main dispute between the parties appears to center around their conflicting definitions of the term "natural gas." CGC apparently defines "natural gas" as that which is extracted from wells in its natural state, without dehydration or without removal of hydrogen sulfide. In other words, CGC's definition is that of untreated natural gas, which may contain certain amounts of the contaminants at issue in this action.

USS and Kelley, on the other hand, defined "natural gas" as that which is suitable for transport in their steel tubes—i.e., non-corrosive, dry and sweet gas, absent contaminants. This dry gas, they claim, is "essentially methane." Indeed, prior to the accident in this case, defendants claim, the DOT and the industry had apparently used the terms "natural gas" and "methane" interchangably. The evidence shows that USS and Kelley were reasonable in their belief that "natural gas" and "methane" could be considered at the time to be virtual equivalents.

Kelley's operation produced a brochure which specified that 3T cylinders were "approved for several gases including Methane." Joint Appendix at 467. Kelley sent a copy of the DOT regulations to Mattingly—regulations which specified that the tubes were authorized to carry methane; in the cover letter to those regulations, William C. George of Kelley's firm wrote that "Part 173.302, Sub 3, of the Code authorizes the transportation of methane (natural gas) in 3-T tubes." Joint Appendix at 496-97. Kelley painted "METHANE" on the side of the cylinder trailers in

bold letters. In other words, Kelley's firm apparently used the terms interchangeably.

A less plausible interpretation of the same facts, and one that CGC would have us believe, is that Kelley somehow connived to make CGC think that methane and natural gas were one and the same, when he believed that this was not true. That version of events would have Kelley painting his trucks with the word "METHANE" even though he knew that they were to be used for transporting the less pure natural gas, and duping CGC into thinking that the DOT regulations were meant to cover natural gas as well as methane. The jury found CGC's story convincing, and we do not overturn their finding lightly. However, under Kentucky law, as we have stated above, there is a presumption of honesty against fraud claims. " 'In actions involving fraud . . . where the facts present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the court, unless the scale decidedly predominates for the latter, will strike the balance in favor of honesty and innocence.' " *T.M. Crutcher Laboratory*, 157 S.W. 2d at 319 (quoting *Pacific Mut. L. Ins. Co.* v. *Arnold*, 262 Ky. 267, 276, 90 S.W. 2d 44, 49 (1935)). There was no evidence proferred of duplicitous behavior or intent to deceive on the part of Kelley or Kelley's operation. We find that Kelley's meshing of "natural gas" and "methane" was more consistent with his honest belief that the terms were interchangeable than with any attempt to fraudulently conceal the truth.

The closest that plaintiff comes to proving fraud with respect to Kelley is the cover letter from Kelley's assistant traffic manager defining the two terms as one. A copy of the DOT regulations was sent to plaintiff with the letter. This representation, to the extent that it is a misrepresentation of law, is not actionable in Kentucky. *Fields* v. *Life & Casualty Co. of Tenn.*, 349 F. Supp. 612, 615 (E.D. Ky.

1972); *Mosley* v. *Owensboro Municipal Housing Comm'n.*, 252 S.W. 2d 880, 881 (Ky. 1952). Moreover, Mattingly did not even read the letter.

USS also used the terms "methane" and "natural gas" interchangeably, according to Peter G. Fairchock, Chief Metallurgist at the Christy Park Plant of USS. Joint Appendix at 1002. More importantly, however, the DOT used the terms interchangeably on a shipping permit, which recited:

> 2. COMMODITY. Natural Gas.
> 3. PROPER SHIPPING NAME (49 CFR 172.5) Methane.

The DOT also recognized that the industry was using the terms interchangeably, and, after the accident, promulgated a clarification which distinguished natural gas from methane, a primary component of natural gas. 43 Fed. Reg. 13,382 (1978) (to be codified at 49 C.F.R. § 173.302(a)).

While it is fairly clear in retrospect that it would be irresponsible in 1988 to use "natural gas" when what is really meant is pure methane, at the time of the accident, this was not the practice. Thus, we believe that in 1977, USS and Kelley properly represented the DOT's regulations as they reasonably interpreted them.[1]

As to the misrepresentations specifically made by USS, CGC claims basically that an advertisement in the *Wall*

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[1]The only indication that the DOT did not intend to permit 3T cylinders for natural gas transport came from a "preface" to a comment in a 1973 issue of the *Federal Register*, 38 Fed. Reg. 21,989 (1973). This preface appeared prior to the DOT's issuing the shipping permit mentioned above permiting 3T cylinders in natural gas service, and prior to the Texas Gas operation. In addition, the preface never became part of the regulations and was not published in the C.F.R. Prior to the accident, USS had no knowledge of the preface. Joint Appendix at 985.

Street Journal was sufficient to establish evidence of fraud. The advertisement generally promoted USS pressure cylinders for use in natural gas transportation. Joint Appendix at 535. The ad did not specifically identify any cylinders, and instead provided a telephone number to call for inquiries. CGC never contacted USS in response to the ad, and therefore received no representations about the cylinders. CGC also claims that USS misrepresented the use of the cylinders through a USS brochure that Mattingly saw in Kelley's offices. Yet, since he never read the brochure, Mattingly could not have gleaned any misrepresentations from it.

2. *No Reliance.* More striking, however, than the paucity of evidence showing any material misrepresentation is the absence of evidence of reliance. The proof offered at trial simply does not establish that Mattingly relied on statements made by USS or Kelley. Rather, Mattingly testified that he never read the brochures by USS or Kelley, nor did he telephone USS in response to the advertisement in the *Wall Street Journal*. Indeed, that article appeared after he had already committed himself to his new business venture. As defendants indicate in their brief, from September 1976 to April 1977, Mattingly incorporated CGC, obtained various quotes on compressor equipment, negotiated with potential buyers of his gas, entered into lease agreements for 3T cylinder trailers from Kelley, executed a contract giving him rights to various gas wells to be used in his operation, began making improvements to the road leading to the compressor site and began laying pipes to transport the gas from the wellheads to the compressor site. The *Wall Street Journal* article appeared months later.

Mattingly claims that he used the article to obtain a loan for his business. Although it is possible that the Small Business Administration may have relied on the advertise-

ment in granting Mattingly the loan (and there was no proof of this), that does not establish that *Mattingly* relied on the advertisement in using the 3T cylinders. In fact, the lease agreement for the cylinders was signed and completed a full four months before the advertisement appeared. Whether the Small Business Administration used the advertisement to grant a loan is irrelevant to the claim that USS fraudulently misrepresented the use of 3T cylinders to Mattingly. Kentucky law requires that the party claiming fraud show that he or she relied on the alleged misrepresentation, not a third party. *Wilson* v. *Henry* 340 S.W. 2d 449, 451 (Ky. 1960).

Moreover, CGC never telephoned USS in response to the advertisement. It is difficult for us to imagine reliance on a fraudulent misrepresentation when the advertisement in question was non-specific, made no promises, and when CGC never even exhibited enough "reliance" on the ad to call the telephone number listed CGC cannot now allege that *if* they *had* called the number, they *would have* relied on some hypothetical USS statement about the propensities of natural gas. Hypotheticals do not constitute reliance. Even so, every person who testified about having spoken with USS regarding the use of 3T cylinders for natural gas transportation acknowledged that USS specified that 3T cylinders were suitable only for sweet, dry gas.

An examination of the brochures that CGC claims also induced reliance supports our conclusion. These brochures are presentations of the various uses to which "seamless pressure vessels" (USS cylinders) can be put. *See* Joint Appendix at 468-95; *id.* at 565-78. Even assuming that it would have been reasonable to rely exclusively on the descriptions contained in these brochures, there is no basis to rely on them for the proposition that it was safe to transport natural gas in 3T cylinders. Rather, the brochures, under the heading of "description," state that "USS Seam-

less Pressure Vessels offer great inherent strength and reliability in handling hydrogen, nitrogen, air, helium, oxygen, and other gases." *Id.* at 472 and 567. The same list is repeated under "typical applications." *Id.* at 477 and 569. Thus, even if the brochures are seen as intended to have induced reliance, they could not reasonably have been relied on to transport natural gas without further inquiry.

As further evidence of reliance, Mattingly asserts in his brief that after the explosion, USS and Kelley continued to assure him that 3T tubes were safe for transporting natural gas and that he should resume his business. *Id.* at 914-15. Under Kentucky law, CGC must show that its reliance on the misrepresentation was the cause of the injury. The damages claimed by CGC cannot be attributable to USS's alleged *post*-explosion misrepresentation. Since CGC never resumed business, CGC could not have relied on USS's alleged assurances. In short, we are unimpressed by the evidence of fraudulent misrepresentation. Plaintiff cannot surmount the first two important hurdles in the test to establish fraud: i.e., that there was a misrepresentation, and that there was reliance. We need proceed no further in our inquiry on the fraud issue.

We therefore reverse with respect to the claim that USS and Kelley fraudulently misrepresented the use of the 3T steel tubes, and remand the case back to the district court with instructions to proceed solely on a negligence theory of liability. We recognize that this decision necessarily affects USS's and Kelley's claim on appeal that the jury instructions given at trial improperly mingled the damages theories as to fraud and negligence. Since on remand the case will be tried only on a negligence theory, there will be no need for an instruction as to the legal theory of fraudulent misrepresentation. A single damages instruction would therefore be acceptable under this singular theory of liability.

B. *Lost Profits Instruction*

The jury awarded CGC $1,137,154 in lost profits as a result of the cylinder explosion. Defendants USS and Kelley challenge the jury instruction on lost profits, claiming that such damages in this case fail for lack of the required certainty under Kentucky law. We agree.

Kentucky law requires that CGC establish the fact of lost profits with reasonable certainty. *Paulines Chicken Villa, Inc.* v. *KFC Corporation*, 701 S.W. 2d 399, 401 (Ky. 1985).[2] *See also Mitchell Coal Company* v. *United Mine Workers of America*, 313 F. 2d 78 (6th Cir. 1963), where this court held that the *Mitchell* plaintiff had not produced enough evidence of lost profits to take its claim to the jury. This court wrote:

> The [plaintiff] had been in business only a few months and had operated at a loss before the happening of the events complained of here. There was no showing that it could have operated at a profit. Even under the liberal rule in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 the loss of profits must be established by at least a

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[2]The *Paulines* court set out in that case the facts that had removed "virtually all the uncertain variables":

> [1] This is a national franchisor, [2] with uniformity of national advertising, [3] uniform quality control, [4] earnings and expense figures on nearby and comparable locations, [5] and an available history concerning success and failure ratios. The franchisee, likewise, [6] is experienced in the field and with the specific product, with [7] a proven record of operation and management, [8] a history of profit and loss, [9] with two current operations in the general area, etc.

701 S.W. 2d at 401-402.

Not one of these nine factors exists in this case.

> reasonable probability and not on sheer speculation and guesswork.

Mitchell, 313 F. 2d at 79.

As defendants point out in their brief, CGC's claim for lost profits is speculative at best. The company was newly formed, in a relatively new industry, and dependant upon the unpredictable gas market at a time when there was an oil crisis. CGC operated only for a total of ten days and transported only eleven loads or partial loads of gas. It never made a profit. CGC had only one customer. Don Fowler, the president of Texas Gas, a gas transport operation 900 miles from CGC, testified that Texas Gas made little or no profit in its gas transport operation, Joint Appendix at 1066 1078-80, and had never operated in Kentucky because it could not find gas wells of a quality and quantity sufficient to warrant the cost of establishing an operation. *Id.* at 1076. Thus, it would appear that CGC had little hope of making any profit, or of continuing in business at all.

CGC's proof of lost profits consisted of the testimony of Dr. Donald Monath, whose calculations were derived merely from subtracting CGC's estimated expense figures from the revenues CGC would realize if it operated at maximum capacity, 365 days a year for ten years. Monath concluded that CGC would have made $1,137,154 over ten years. *Id.* at 964. He made no effort to determine whether CGC in fact could make a profit or could continue to operate in the area. He was not informed as to how CGC developed its cost estimates, how long the company had operated, the nature of the product, or the level of CGC management's experience. *Id.* at 945, 968-71, 975. It is apparent to us that these figures were far too speculative to permit an instruction on lost profits. We therefore reverse with respect to this issue as well, holding that the evidence on lost profits was insufficient to warrant submitting that issue to the jury.

C. *Other Issues*

We assume, without deciding, that defendants did not waive the issue of the 12% post-judgment interest rate applied to their verdict by the district court. We believe that the district court incorrectly applied an interest rate in excess of the statutory mandate, and that on remand, the district court should be guided by 28 U.S.C. § 1961 in applying an interest rate to any verdict that may result from the new trial.

We have carefully reviewed the other claims on appeal and on cross-appeal, and are unable to conclude that they also constitute reversible error. We therefore affirm on the remaining issues.

III. CONCLUSION

For the reasons set forth above, we REVERSE on the issues of fraudulent misrepresentation and lost profits, and REMAND the case back to the district court for a new trial, to proceed on a negligence theory of liability only. We instruct the district court to apply the proper interest rate to the damages verdict, if any, on remand. The jury verdict below is VACATED. We AFFIRM on all remaining issues.

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 87-5535/5608

COMPRESSED GAS CORPORATION, INC., - - - - - - - *Plaintiff-Appellee, Cross Appellant,*

v.

UNITED STATES STEEL CORPORATION and JACK B. KELLEY, INC., - - - *Defendants-Appellants, Cross Appellees.*

Before: KEITH, KENNEDY and NELSON, Circuit Judges.

JUDGMENT—Filed November 23, 1988

ON APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed on the issues of fraudulent misrepresentation and lost profits; the case is remanded for a new trial, to proceed on a negligence theory of liability only; this court instructs the said district court to apply the proper interest rate to the damages verdict, if any, on remand; the jury verdict is vacated; all remaining issues are affirmed.

Each party is to bear its own costs on appeal.

Entered by Order of the Court

Leonard Green, Clerk

(s) Leonard Green
Clerk

A True Copy.

Attest:

(s) Cheryl Borkowski, Deputy Clerk
(Mrs.) Cheryl Borkowski

APPENDIX 3

UNITED STATES COURT OF APPEALS

No. 87-5535/5608

FOR THE SIXTH CIRCUIT

COMPRESSED GAS CORPORATION, INC., - - - - - - - *Plaintiff-Appellee, Cross Appellant,*

v.

UNITED STATES STEEL CORPORATION and JACK B. KELLEY, INC., - - - *Defendants-Appellants, Cross Appellees.*

BEFORE: KEITH, KENNEDY and NELSON, Circuit Judges.

ORDER—Filed November 9, 1988

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

APPENDIX 4

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. C-78-0063-O(M)
Consolidated With:
Civil Action No. C-78-0144-O(M)

COMPRESSED GAS CORPORATION, INC. - - - *Plaintiff*

v.

UNITED STATES STEEL CORPORATION and
JACK B. KELLEY, INC. - - - - - *Defendants*

ORDER—Entered April 17, 1987

For the reasons set forth in the memoradum filed this date,

IT IS ORDERED that the motion of the defendants, United States Steel Corporation and Jack B. Kelley, Inc., for a judgment notwithstanding the verdict be and it hereby is denied.

IT IS FURTHER ORDERED that the motion of the defendants, United States Steel Corporation and Jack B. Kelley, Inc., for a new trial be and it hereby is denied.

There is no just reason for delay, and this is a final and appealable order.

Dated this 14th day of April, 1987.

(s) Ronald E. Meredith
Ronald E. Meredith
Judge, U.S. District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. C-78-0063-O(M)
Consolidated With:
Civil Action No. C-78-0144-O(M)

COMPRESSED GAS CORPORATION, INC. - - - *Plaintiff*

v.

UNITED STATES STEEL CORPORATION and
JACK B. KELLEY, INC. - - - - - - *Defendants*

MEMORANDUM OPINION—Entered April 17, 1987

The above-styled action is before the Court on the motion of the defendants for judgment notwithstanding the verdict (JNOV), Federal Rules of Civil Procedure, Rule 50(b), or in the alternative, for a new trial, Federal Rules of Civil Procedure, Rule 59. The defendants have requested a hearing before the Court on this motion. Having conducted several hearings and/or pretrial conferences in this action, having addressed numerous motions involving the same issues at bar and having presided over a nineteen day jury trial concerning same, this Court believes that a hearing would be neither helpful nor is necessary in the disposition of the instant motion; therefore, the defendants' request for a hearing is denied. *See:* Rule 10(c), Rules of the United States District Court for the Western District of Kentucky.

I. Motion for Judgment Notwithstanding the Verdict (JNOV)

The defendants, United States Steel Corporation and Jack B. Kelley, Inc., allege the following grounds in support of their motion for judgment notwithstanding the verdict:

1. The proof presented at arial establishes no causation between the conduct of United States Steel Corporation and Jack B. Kelley, Inc. and the accident at Shrewsbury.

2. The proof at trial establishes the plaintiff's negligence as a matter of law.

3. The proof establishes that by the expressed terms of the plaintiff's trailer lease with Jack B. Kelley, Inc., the plaintiff has no cause of action against Jack B. Kelley, Inc.

4. The plaintiff failed to produce evidence in support of its fraud claims.

5. The plaintiff failed to produce proof sufficient to support its claim for lost profits.

6. The plaintiff produced no evidence of any recoverable damages.

A review of the defendants' memorandum in support of its motion for directed verdict (Exhibit A to the memorandum in support of defendants' motion for JNOV and, in the alternative, new trial) reveals that the same grounds argued in support of that motion are in substance re-argued in the defendants' motion for JNOV with two exceptions. First, in the defendants' motion for directed verdict, the issue of punitive damages was addressed. This Court determined that there was no evidence to support the plaintiff's claim for punitive damages; therefore, this issue was

not presented to the jury for their consideration. Second, the defendant has attempted to substitute the issue of punitive damages contained in the motion for directed verdict with the issue that the plaintiff produced no evidence of any recoverable damages as contained in its motion for JNOV. The Court has re-read the defendants' motion for directed verdict to ascertain if this newly raised issue was somehow argued under one of the other issue headings of that motion. The Court finds that this was not the case concerning this issue. As such, defendants' motion for directed verdict did not include the issue concerning the lack of evidence regarding any recoverable damages and since F.R. Civ. P. 50(b) provides that a JNOV is to be entered "in accordance with his motion for directed verdict . . . ," defendants may not be heard now to enlarge that motion to include an issue not incorporated in the motion. In *Kinzenbaw* v. *Deere & Co.*, 741 F. 2d 383, 387 (F. Civ. 1984), *cert. denied*, 470 U.S. 1004, 105 S. Ct. 1357 (1987), the Court of Appeals for the Federal Circuit made the following observation.

> Rule 50(a) of the Federal Rules of Civil Procedure requires that '[a] motion for a directed verdict shall state the specific grounds therefor.' If a party fails to specify an issue in its motion for a directed verdict, it may not subsequently challenge the jury's virdict on that issue, which is conclusive on that point. *U.S. Industries, Inc.* v. *Blake Construction Co.*, 671 F. 2d 539, 548 (D.C. Cir. 1982). A specific reference to this issue in a motion for judgment n.o.v. does not cure a prior failure to include the issue in the motion for a directed verdict and, thus, does not preserve the issue for appeal. *See* 9 C. Wright and A. Miller, *Federal Practice and Procedure* §2537 (1971).

The Court believes that the quoted language is dispositive of defendants' argument concerning this particular issue.

Save for the two issues discussed above, the defendants' motion for JNOV is in all practical senses a mirror image of its motion for directed verdict. As stated above, this is rightfully so since F.R.C.P., Rule 50(b) provides that a JNOV is to be entered "in accordance with his motion for directed verdict . . ." At trial, the counsel for the defendants, Mr. McCall, orally argued various important points of the defendants' motion for directed verdict at the close of the plaintiff's proof but informed the Court that he did not wish to detract from the written motion for directed verdict and the memorandum of law tendered in support thereof. Likewise, at the end of all the proof, the defendant's counsel, Mr. Gwin, again appropriately moved for a directed verdict. While Mr. Gwin very ably orally argued his case, he also informed the Court that the defendants had previously tendered to the Court a written motion for directed verdict with supporting memorandum and would continue to rely on it is supplemented by some additional caselaw. It is obvious that the defendants' previously tendered written motion for directed verdict with supporting memorandum is the cornerstone of the defendants' motion for JNOV.

Excluding the issue involving the lack of evidence of any recoverable damages, the five remaining issues raised in the defendants' motion for JNOV were extensively addressed before and during trial. These issues were addressed on summary judgment and through various motions in limine. At lease one written opinion and/or order was entered by this Court addressing each of these five issues with at least two written opinions being entered on the indemnification/trailer lease issue. Extensive and unlimited debate of these issues was had between the parties during pretrial conferences and the oral arguments on motion for directed verdict. These issues were summarized in the pretrial briefs submitted by the parties to the Court.

The extensive nature of the pleadings filed in reference to these five issues is accented and referenced by the footnotes contained in the defendants' memorandum in support of defendants' motion for judgment notwithstanding the verdict and, in the alternative, new trial. To say that the five issues raised in support of the defendants' motion for JNOV have been previously raised and discussed is in this Court's opinion an understatement.

As limited by the discussion above, this Court is confronted with the same issues in ruling on the defendants' motion for judgment notwithstanding the verdict that it was compelled to address in deciding the defendants' motion for directed verdict. As such, the standards of evaluation are the same. The Court has previously discussed on the record the applicable standards as determined by the Sixth Circuit Court of Appeals. In reference to the standards to be utilized in deciding either of these motions, the Sixth Circuit has stated:

> A judgment notwithstanding the verdict has long been recognized as the legal equivalent of a directed verdict and both are governed by the same standards. *See Warkentien* v. *Vondracek*, 633 F. 2d 1, 7 (6th Cir. 1980); *Garrison* v. *Webb Co.*, 583 F. 2d 258, 261 (6th Cir. 1978). In a diversity case our Circuit looks to state law in determining whether there was sufficient evidence presented to withstand a motion or directed verdict. *Garrison* v. *Webb, supra; O'Neill* v. *Kiledjian*, 511 F. 2d 511, 513 (6th Cir. 1975); *Chumbler* v. *McClure*, 505 F. 2d 489, 491 (6th Cir. 1974). To determine the sufficiency of the evidence under the law of Kentucky, "the court must draw all fair and rational inferences from the evidence in favor of the party opposing the motion and a verdict should not be directed unless the evidence is insufficient to sustain the

verdict." *Spivey* v. *Sheeler*, 514 S.W. 2d 667, 673 (Ky. 1974). *See also Perry* v. *Ernest R. Hamilton Assocs., Inc.*, 485 S.W. 2d 505 (Ky. 1972).

Calhoun v. *Honda Motor Company, Ltd.*, 738 F. 2d 126, 129 (6th Cir. 1984). The Sixth Circuit had previously elaborated on this matter in *Garrison* v. *Jervis B. Webb Co.*, 583 F. 2d 258 (6th Cir. 1978) when it said:

> The law of Kentucky on the standard for granting a motion for a directed verdict has been variously stated. The general rule should be granted when, drawing all inferences in favor of the nonmoving party, there is no substantial probative evidence which could support a verdict in the nonmoving party's favor and reasonable men could only conclude that the moving party was enitled to a verdict. *Spivey* v. *Sheeler*, 514 S.W. 2d 505, 508 (Ky. 1972); *Harris* v. *Cozatt, Inc.*, 427 S.W. 2d 574, 575 (Ky. 1968); *Current* v. *Columbia Gas of Kentucky, Inc.*, 383 S.W. 2d 139, 142 (Ky. 1964); *Lee* v. *Tucker*, 365 S.W. 2d 849, 851 (Ky. 1963); *Wadkin's Adm'x* v. *Chesapeake & Ohio Ry. Co.*, 298 S. W. 2d, 7, 9-10 (Ky. 1956).
>
> This standard, of course, is essentially the same as the federal standard, 5A Moore's ¶50.02[1] and Wright §94, pp. 415-16, so it is of little consequence whether we apply the state or federal standard in Kentucky diversity cases.

583 F. 2d at 261, Footnote 4.

The Court has read the defendants' motion for JNOV with an eye cast to any nuances or additional elaboration on the facts of the case that would change the Court's mind concerning the reasoning utilized in denying the defendants' motion for directed verdict at both the close of the plaintiff's case and the close of all the evidence. The Court

has not only reviewed all the Exhibits tendered with the defendants' motion and reply but has also reviewed various other pleadings that it deems helpful in refreshing its memory concerning these issues. The Court has reviewed its trial notes as well as excerpts from the trial tapes. Having considered all of this information in light of the standards set forth at trial and restated above, this Court remains convinced that these issues should have gone to the jury. The Court finds that the jury's verdict is supported by competent evidence and this Court will not disturb it.

II. Motion for New Trial

The defendants, United States Steel Corporation and Jack B. Kelley, Inc., in the alternative or n conjunction with their motion for JNOV also have moved for a new trial. In support of this motion the defendants allege the following grounds:

1. The plaintiff's designation of additional expert witnesses and taking of additional discovery following the summary jury trial substantially, unfairly prejudiced the defendants.
2. Plaintiff's counsel's misconduct during the trial of the case mandates a new trial.
3. Numerous unduly prejudicial trial irregularities requre a new trial.
4. The evidence does not support the verdict.
5. The damages awarded are illegally excessive and improper.

As stated by the defendants in the instant motion, "in diversity cases in federal courts, the granting or denial of a new trial constitutes a procedural matter governed by federal law. A motion for new trial falls within the

sound discretion of the trial judge in the general interests of justice." (Defendants' memorandum, page 21). In determining whether a new trial should be granted or denied and what serves the general interests of justice, the trial court must consider various factors. These factors were recently discussed in *Lewis* v. *Elliott*, 628 F. Supp. 512, 516 (D. D.C. 1986) at which time that court stated:

> A trial judge should grant a new trial if the verdict is against the weight of the evidence, damages are excessive, for other reasons the trial was not fair, or substantial errors occurred in the admission or rejection of evidence or the giving or refusal of instructions. (cites omitted). In deciding whether to grant a new trial, the court should be mindful of the jury's special function in our legal system and hesitate to disturb its finding. (Cites omitted). Nevertheless, if the Court after considering all the evidence and the jury's verdict is left with the "definite and firm conviction" that a mistake has been committed, it should grant a new trial. 11 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §2806 (1973).

In further elaborating on the factor concerning the weight of the evidence, the Sixth Circuit has said:

> In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence (*Felton* v. *Spiro*, 78 F. 576 (6th Cir. 1897) Taft, J.), *General American Life Ins. Co.* v. *Central Nat'l Bank*, 136 F. 2d 821 (6th Cir. 1943), and "it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence * * *."

* * * * * * *

> "[C]ourts are not free to reweigh the evidence and set aside the jury verdicts merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520 (1944); *Werthan Bag Corp.* v. *Agnew*, 202 F. 2d 119, 122 (6th Cir. 1953). Thus, while the district judge has a duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which could reasonably have been reached.
>
> * * * * * * *
>
> With respect to the applicable scope of review of a District Court decision granting or denying a new trial on the basis of the weight of the evidence, it is well settled that reversal may be predicated only upon an abuse of discretion.
>
> *TCP Industries, Inc.* v. *Uniroyal, Inc.*, 661 F. 2d 542, 546 (6th Cir. 1981), *quoting Duncan* v. *Duncan*, 377 F. 2d 49, 52-53 (6th Cir. 1967), *cert denied*, 389 U.S. 913, 88 S. Ct. 239, 19 L. Ed. 2d 260 (1967). Thus, the district court is afforded broad discretion in ruling on new trial motions. *See generally* 10 C. Wright and A. Miller, Federal Practice and Procedure §2818 (1971).

Bruner v. *Dunaway*, 684 F. 2d 422, 425 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171, 103 S. Ct. 816 (1983).

As its first ground in support of its motion for new trial, the defendants allege that they were substantially, unfairly prejudiced by the plaintiff's designation of additional expert witnesses and the making of additional discovery subsequent to the summary jury trial held in February 13, 1985. The defendants contend that the summary jury trial process mandates that a case be trial ready and that all

discovery be completed prior to the hearing. The Court takes no exception to this observation. However, the Court believes that the defendants miss the purpose for utilizing the summary jury trial. The summary jury trial is merely another device utilized by the trial court to resolve disputes in hopes of avoiding time consuming and expensive trials. The case at bar was tailor made for the summary jury trial process, unfortunately, in this instance, it did not resolve the dispute without the necessity of trial.

* * * * * * *

counsel acknowledged that the revisions had been made but never asserted any objections to any of the substantive damage instructions.

The Court has reviewed the jury instructions and verdict form in their entirety. In keeping with controlling caselaw, the Court painstakingly attempted to incorporate all counsels' requests concerning these instructions. Where a particular instruction could not be used, the Court attempted to modify its instructions to make sure that all appropriate theories were before the jury. This Court is convinced that the instructions in *toto* were balanced, fundamentally accurate and comprehensive in keeping with the mandates of the *Scheib* case. In this Court's opinion, there are no errors in the charge to the jury which was so fundamental and plain that it creates a miscarriage of justice.

As to the alleged irregularities involving Dr. Monath's testimony and the evidence of personal injury and death, the Court believes that these issues have already been resolved. The Court on the record considered Dr. Monath's qualifications, the defendants' ten objections to his testimony, the underlying data which was the basis of his opinion and the controlling precedent. Taking all of these factors into consideration, the Court was convinced at trial and is convinced now that this witnesses's testimony was

admissible and would assist the trier of fact in understanding the lost profits' claim. *See:* F.R. Evid., Rules 702, 703. The defendant also contends that the admission of the evidence concerning personal injuries and death was unduly prejudicial and should not have admitted. The Court entered a written opinion on this issue on October 22, 1986 (Docket #658) and remains convinced that its findings were appropriate. In restrospect, the Court emphasizes that this evidence was not dwelt on at trial in a manner which was unduly prejudicial and this Court is convinced that the limited admissibility of this evidence helped to prevent jury confusion concerning the accident at Shrewsberry.

The Court has merged its discussion of the defendant's last two grounds in support of its motion for new trial. The defendants allege that the verdict runs contrary to the great weight of the evidence in reference to the issues of recoverable damages, fraud, causation and the claims of breach of warranty against Jack B. Kelley, Inc. As the defendants indicate, these issues have been addressed in their previous trial briefs as well as in its preceding motion for JNOV. As this Court has also stated, these issues have also been addressed via motions for summary judgment, motions in limine, various bench rulings and on two different occasions on motion for directed verdict. Based on these previous opinions and the standards for granting new trials contained on pages 8-10 of this opinion, the Court remains convinced that the evidence presented via sworn testimony and the exhibits was more than sufficient to support the verdict returned by the jury in this action.

Finally, the defendants contend that recovery of excessive damages was permitted through double recovery and an improper measure of damages. The Court did not consider this issue on the defendants' motion for JNOV because it had not been raised on the defendants' motion

for directed verdict. However, this issue was addressed in the Court's discuission of trial irregularities concerning jury instructions. As such, the Court is not compelled to discuss this issue further.

The defendants' motion for judgment notwithstanding the verdict and for new trial shall be denied. An appropriate order shall be entered this date.

Dated this 14th day of April, 1987.

(s) Ronald E. Meredith
Ronald E. Meredith
Judge, U.S. District Court

cc: Counsel of Record

USS

Seamless Steel Cylinders For Transporting Gases Under DOT Regulations

General Description

USS Seamless Steel Cylinders for transportation of gases are designed and constructed in compliance with the requirements of U. S. Department of Transportation Regulations. These regulations include specifications for cylinder design and construction, as well as rules for shipping hazardous materials. DOT issues special permits to reflect new cylinder design and construction which later become part of the official regulations.

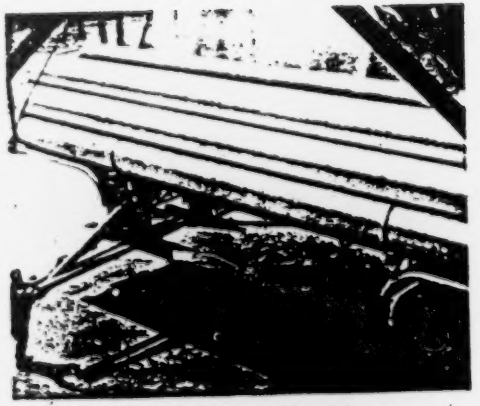
natural gas, anhydrous hydrochloride, air, argon, boron trifluoride, nitrous oxide, carbon dioxide, and many other industrial gases by common or private carriers over public highways, railways and waterways.

Availability

USS Seamless Steel Cylinder conforming to DOT regulations can be furnished in any of the sizes shown below.

Outside Diameters: 12¾ in. to 24 in.

Lengths: Up to 36 ft.

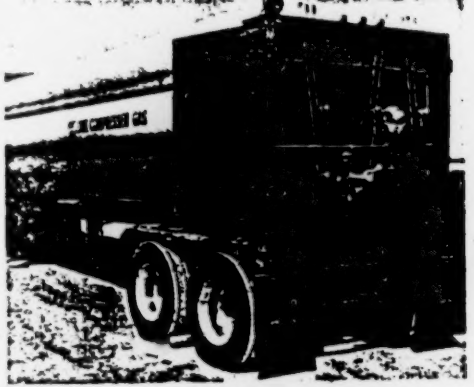


This ten-vessel trailer unit is being unloaded from a freighter. Cargo was helium at 2640 psi.

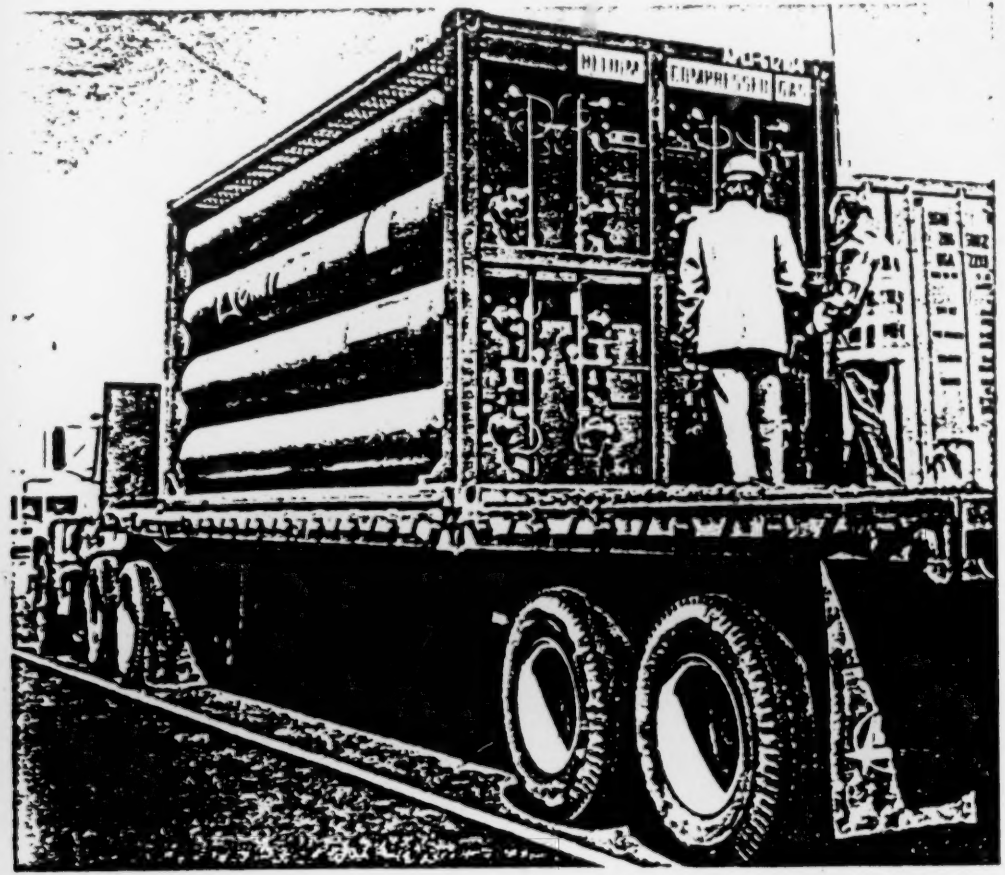
Typical Applications

USS Seamless Cylinders, built to DOT Regulations are used to transport compressed helium, hydrogen, nitrogen, oxygen, methane,

Wall Thicknesses: ½ in. to 1½ in.
Design Pressures: From 1000 to 15,000 psi.
Capacity (water volume): Up to 83.6 cu. ft.



One of the primary advantages of high capacity, longer length USS Seamless Pressure Vessels is the economical simplification of manifolding and valving.



With vessels and rugged frame of this modular, containerized 16-cylinder assembly built of high-strength steels, gross weight was held to 43,000 lbs. max. Total gas capacity is 115,000 scf in only 160 sq. ft. of space. DOT-approved and ABS-certified for shipboard transport, these modules are stackable six high for added space savings.

APPENDIX 6

[LETTERHEAD OF DEPARTMENT OF TRANSPORTATION—Hazardous Materials Regulations Board, Washington, D.C.]

(Docket No. HM-99; Admits No. 171-21, 173-55, 178-27)

SPECIFICATIONS 3AX, 3AAX, AND 3T CLYINDERS

The purpose of this amendment to the Hazardous Materials Regulations is to amend §§ 171.7, 173.34, 173.301, 173.302 and 173.304, and to add a new section 178.45, DOT specification 3T, to provide for the shipment of certain gases on large cylinders or tubes mounted on a motor vehicle.

On April 4, 1972, the Hazardous Materials Regulations Board published a notice of proposed rulemaking, Docket No. HM-99; Notice No. 72-3 (37 PR 6747), which proposed this amendment. Interested persons were invited to give their views and several comments were received by the Board.

1. *Hydrogen chloride.* A commenter stated that the proposed regulations omitted the authorization for hydrogen chloride to be shipped in DOT-3T cylinders. This authorization was purposely omitted because the Board has not completed its evaluation of DOT-3T cylinders in hydrogen chloride service.

2. *Nonliquefied natural gas.* Another commenter requested that the regulations be amended to permit nonliquefied natural gas to be shipped in DOT-3AX, 3AAX, and 3T cylinders. The Board has not authorized nonliquefied natural gas to be shipped in these cylinders because it has not been demonstrated that impurities which may be present in the gas would not affect the structure of the particular steel used in the manufacture of these cylinders.

3. *Design criteria for cylinders.* The proposed regulations provide design criteria for cylinders of 1000 pounds or more water capacity. A commenter has stated that this same design criteria should be applicable for cylinders of less than 1000 pounds water capacity and has requested that, wherever appropriate, the proposed regulations be amended to include the design criteria for the smaller water capacity cylinders. As this request is not within the scope of the present rule making, the Board did not address itself to the comment in this amendment.

4. *Cylinder attachment to vehicle.* Another commenter objected to the proposal which would require the rear end of the cylinders to be affixed to the vehicle. This commenter stated that adequate expansion provisions can be in-

APPENDIX 7

TEAGUE'S DEPOSITION EXHIBIT 20

February 12, 1971
Mr. Weldon M. Teague
Jack B. Kelley, Inc.
3801 Virginia Avenue
Amarillo, Texas 79109

Dear Mr. Teague:

Subject: Your Letter of February 3, 1971
Air Products & Chemical Letter
of January 22, 1971

The Air Products request is not unusual. They would automatically get this information from us if it were a direct purchase. DOT regulations do not require that the information be passed along by the original purchaser to subsequent owners of the cylinders, and this is the reason why the cylinders are registered with the Bureau of Explosives by the authorized inspection agency for traceability. You should protect your company, however, by some means of having new ownership recorded should legal action occur concerning the cylinders you bought. If you are not doing this, I would suggest you write the Bureau of Explosives and ask how others handle this situation.

Concerning the particulars of the Air Products request, we were unaware of Rev. 7 to Special Permit No. 5372, and can see why Air Products wants certification of compliance. They can't prove they are hauling around Rev. 7 cylinders if the certification doesn't say so and that ASD: A-372 Class 5, Type E material is identified on the report.

We have requested the mill to ask Hunt Inspection to revise the Inspection Report accordingly and copies will be

sent to you, The Bureau of Explosives and U. S. Steel as soon as possible. In addition to the revised report you should make copies of the other attachments listing material analysis, mechanical properties, and other tests sent to you earlier. Pick out the appropriate documents for the serial number of the cylinder used for the trailers furnished.

To keep us both legal and in turn with you: customers, we again request that you show on your purchase order to us that the cylinders are to conform to the requirements of Special Permit No. 5372, Rev. 7 or to revisions that follow.

We hope this review and action taken will allow you to satisfy Air Products.

Incidentally, we note that methane is listed as a gas that can be hauled in the high-strength light-weight—Special Permit 5372, Rev. 7 cylinders. This is satisfactory if the methane has been processed to remove all hydrogen sulfides and dehydrated. We do not recommend this high-strength tube for hauling natural gas. Our DOT-3AAX specification tube should be used for hauling natural gas.

Very truly yours,

W. H. Van Vlack
Metallurgical Engineer

cc: J. H. Rooney

bcc: H. N. Hubbard

No. 88-1316

(3)

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMPRESSED GAS CORPORATION - - Petitioner,

versus

UNITED STATES STEEL CORPORATION and
JACK B. KELLEY, INC. - - - - - Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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42 pp
& folds

QUESTIONS PRESENTED[1]

I. Is the Seventh Amendment violated by the Sixth Circuit's ruling that there was insufficient evidence of fraudulent misrepresentation under Kentucky law to submit the issue to a jury?

II. Does the Sixth Circuit's application of Kentucky law create a conflict among federal circuits that apply the laws of different states in diversity cases?

III. Did the Sixth Circuit correctly apply Kentucky law limiting the recovery of alleged lost profits?

IV. May Congress pass a law fixing the rate of post-judgment interest in diversity cases?

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[1]Pursuant to United States Supreme Court Rule 28.1, USS provides the following information. United States Steel Corporation changed its name to USX Corporation in the summer of 1986. By stipulation of the parties, the trial was conducted using the name, United States Steel Corporation. USX Corporation is a publicly-owned corporation.

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No. 88-1316

IN THE

SUPREME COURT OF THE UNITED STATES

COMPRESSED GAS CORPORATION - - *Petitioner,*

v.

UNITED STATES STEEL CORPORATION and
JACK B. KELLEY, INC. - - - - *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

In addition to the opinions and judgments reprinted in the appendix to the Petition for a Writ of Certiorari, the Judgment of the United States District Court for the Western District of Kentucky is reprinted in the Appendix at p. 1a.

STATEMENT OF THE CASE

The Opinion of the United States Court of Appeals for the Sixth Circuit correctly states the facts of this case. For brevity, United States Steel Corporation ("USS") and Jack B. Kelley, Inc. ("Kelley")[2] adopt

[2]Compressed Gas Corporation's Petition incorrectly refers to Jack B. Kelley, Inc. as Jack B. Kelley Co., Inc.

and incorporate by reference the facts set forth in that decision. (Appendix, pp. 5a-8a) USS and Kelley provide the following additional facts relevant to the issues before the Court.

(1) The evidence at trial established that 3T cylinders are safe containers for uncontaminated natural gas and no witness testified otherwise.

(2) Neither USS nor Kelley ever represented to anyone that 3T cylinders could be used to transport gases contaminated with hydrogen sulfide and water. In fact, USS advised all who inquired of the requirement for uncontaminated gas.

(3) The Department of Transportation ("DOT") by special permit issued in *1974* authorized transportation of "natural gas, proper shipping name methane" in 3T cylinders. In a *1973* preface comment which appeared in only one issue of the *Federal Register,* the DOT appeared to distinguish natural gas from methane and to interpret the regulations listing the gases approved for transport in 3T cylinders as excluding natural gas; however, it reversed its position when it later granted the 1974 permit specifically allowing natural gas transport in 3T cylinders and treating it as synonymous with methane.

USS had no actual knowledge of the 1973 preface comment (which never became a part of the regulations and never appeared in the *Code of Federal Regulations*). However, USS did have actual knowledge of the special permit allowing natural gas transport in 3T cylinders and equating natural gas with methane,

a gas specifically listed in the regulations as approved for transport in 3T cylinders. After the accident in this case, the DOT amended its regulations to exclude natural gas as a product suitable for transport in 3T cylinders, but the DOT specifically acknowledged that its prior regulations had confused the industry.

(4) The DOT regulates both manufacturers and *users* of 3T cylinders. The *user* regulations published in the *Code of Federal Regulations* and directly applicable to Compressed Gas Corporation ("CGC") prohibited users of 3T cylinders from introducing into the cylinders any substance that might impair the cylinders' serviceability. Every expert at trial agreed that hydrogen sulfide would impair the cylinders' serviceability. Post accident analysis of CGC's natural gas wells revealed that, contrary to CGC's pre-accident representations to Kelley and others, the wells contained high concentrations of hydrogen sulfide and water. Every expert at trial agreed that, absent CGC's introduction of hydrogen sulfide or water into the cylinders, the rupture would not have occurred.

(5) CGC ignored or refused to learn the DOT regulations applicable to its activities. CGC's founder and principal, Gobel Mattingly, saw a Kelley brochure which promoted 3T cylinders, but he never read the DOT regulations that were identified on the front of the brochure. Prior to the accident, at CGC's request, Kelley sent CGC a copy of the actual DOT regulations specifically setting forth the gases approved for transport in 3T cylinders. Again, Mattingly testified he

did not read the regulations or the cover letter that came with them. In addition, while visiting Kelley's Texas offices, Mattingly saw but *did not read* a USS brochure which advised that the DOT governed the use of the cylinders. Mattingly testified that he did not read any USS brochures, rather he only "looked at the pictures."

(6) No natural gas trailer transport business ultimately made a net profit. The only other similar operation in CGC's geographic region discontinued operations because of economic infeasibility. During the gas curtailments in the late 1970's a nearby southern Indiana hotel set up an operation similar to CGC's to meet its gas needs. After only two months of operation, it discontinued the project because it could buy gas more cheaply from the local utility than it could run the truck transport operation.

(7) In an attempt to create support for its claim for lost profits, CGC has mischaracterized the evidence from Don Fowler of Texas Gas Transport. Contrary to statements in CGC's Petition, Fowler never testified that his company made $14 million in gross revenues. CGC also fails to note that Fowler's companies' *gross* revenues resulted from a variety of enterprises unrelated to its gas transport business. Fowler specifically testified that he did not realize a net *profit* on his gas transport business. Moreover, in no event could Fowler's operation provide support for CGC's claim for lost profits. Fowler operated in a different market area 900 miles from CGC's operations, and Fowler

used only uncontaminated natural gas. Fowler pointed out that he had considered and abandoned efforts to operate in Kentucky because he could not find wells with gas in the quantity and quality necessary to justify a gas hauling business.

REASONS FOR DENIAL OF WRIT

I. Summary Of Arguments

This case is a diversity, tort case in which Kentucky substantive law provides the rule of decision. CGC has overlooked this simple fact and has presented nothing warranting a writ of certiorari in its Petition.

The Sixth Circuit received on appeal a trial court verdict awarding damages almost forty times the trial evidence of property damage. The Sixth Circuit could not find sufficient evidence in the record to justify a jury finding of fraudulent misrepresentation, reliance on misrepresentation, or lost profits. Reviewing the record and applying the standards of review required of it, the Sixth Circuit reversed the trial court and narrowed the issues for retrial.

Each of the four arguments CGC presents in its Petition fails: (1) the Seventh Amendment does not inhibit a directed verdict or JNOV where insufficient evidence exists to submit the case to the jury. *Galloway* v. *United States,* 319 U.S. 372 (1943). (2) Decisions of federal courts of appeals applying the laws of different states in diversity actions do not create reviewable conflicts among the circuits. *Ruhlin* v. *New*

York Life Ins. Co., 304 U.S. 202, 206 (1938). (3) Under applicable Kentucky law and, indeed, federal law as well, CGC failed to produce sufficient evidence that it could ever make a profit even absent the accident. *Pauline's Chicken Villa, Inc.* v. *KFC Corp.*, Ky., 701 S.W. 2d 399, 401 (1985); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). (4) Finally, 28 U.S.C. § 1961(a) controls the rate of post-judgment interest on diversity cases. "The accrual of interest on judgments is an ordinary incident of judicial relief, and . . . the power that creates the tribunal that enters the judgment can also provide for such ordinary incidents." *Weitz Co., Inc.* v. *Mo-Kan Carpet, Inc.*, 723 F. 2d 1382, 1386 8th Cir. 1983). Therefore, CGC has presented no issue for review by this Court and its Petition must be denied.

II. Is The Seventh Amendment Violated By The Sixth Circuit's Ruling That There Was Insufficient Evidence Of Fraud To Submit The Issue To A Jury?

A. The Court May Withdraw a Case From the Jury For Insufficient Evidence.

The court's decision in *Galloway* v. *United States*, 319 U.S. 372 (1943) confirms the federal court's power to withdraw a case from a jury based on insufficiency of the evidence. In *Galloway*, the court stated:

> If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been

> foreclosed by repeated decisions made here consistently for nearly a century.
>
> * * *
>
> It is not that 'the rules of the common law' in 1791 deprived trial courts of power to withdraw cases from the jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of the facts in 1791.

319 U.S. at 389-90.

B. The Sixth Circuit Correctly Determined Insufficient Evidence of Fraud.

The Sixth Circuit correctly ruled that CGC failed to produce sufficient evidence of fraud to permit submission of the issue to the jury.

Contrary to the representation in CGC's Petition, the Sixth Circuit specifically stated the standard of review it applied. At page 6a of its Opinion, the Court states that it "will reverse the denial of a judgment notwithstanding the verdict if we do not find the evidence of fraud of probative value having fitness to induce conviction in the minds of reasonable persons". The Court goes on to find at page 7a of its Opinion that CGC failed to present " 'more than a scintilla of evidence' toward meeting" its burden of proof. Both the Kentucky courts and the federal courts follow the same "more than a scintilla of evidence" standard regarding sufficiency of the evidence as the Sixth Circuit applied in this case. *Wadkins' Adm'x* v. *Chesapeake & Ohio Railway Co.*, Ky., 298 S.W. 2d 7, 9 (1956); *Gun-*

ning v. *Cooley,* 281 U.S. 90, 94 (1930); *Improvement Co.* v. *Munson,* 81 U.S. (14 Wall.) 442, 449 (1871).

Kentucky law requires proof of all elements of fraud by clear and convincing evidence. *Wahba* v. *Don Corlett Motors, Inc.,* Ky. App., 573 S.W. 2d 357, 359 (1978). To overcome a directed verdict on a fraud claim under Kentucky law, the party asserting the fraud must sustain the burden of proof. This burden requires clear and convincing evidence of all elements of fraud. In other words, as stated by this Court in a case involving the clear and convincing evidence burden of proof in the context of the malice element in a libel action:

> Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or *for a directed verdict* necessarily implicates the susbtantive burden of proof that would apply at the trial on the merits.
>
> * * *
>
> [T]hat is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity (emphasis added).

Anderson v. *Liberty Lobby, Inc.,* 477 U.S. 242, 252, 257 (1986).

Similarly, the standard of review in the present case is whether there was more than a scintilla of evidence of probative value having fitness to induce conviction in the minds of reasonable persons that *all* the *elements*

of fraud had been shown *with convincing clarity.* The Sixth Circuit properly ruled that CGC did not produce evidence sufficient to warrant submission of its fraud claim to the jury. The Appellate Court acted within its well-established power and no Seventh Amendment issue arises from its ruling.

C. The Sixth Circuit Properly Considered All Evidence of Reliance.

CGC's allegation that the Sixth Circuit's Opinion "rests in part upon the wrong evidence" has no basis. CGC complains that the Court did not properly consider page 16 of the USS brochure when it ruled that CGC presented insufficient evidence of reliance to support a fraud claim. CGC specifically raised the same argument before the Court of Appeals in its Petition for Rehearing. The Court of Appeals confirmed that it did consider precisely the same evidentiary issue when it stated in its order denying the Petition:

> The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. (Appendix, p. 18a)

Further, the Sixth Circuit correctly construed this exhibit in its analysis and opinion. The Sixth Circuit noted in its Opinion at page 11a, the USS brochure relates to "various uses to which seamless pressure vessels . . . can be put." The brochure refers to gases that a variety of USS pressure vessels can trans-

port without specifying which gases are suitable for which vessels. The USS brochure contains *no* representation regarding the particular use (contaminated natural gas) to which CGC put 3T cylinders. The Sixth Circuit correctly noted that CGC could not rely on the brochure without further inquiry.

Moreover, the record establishes that CGC could not have relied on the USS brochure at trial because Mattingly never read the brochure. Although Mattingly read to the jury at trial portions of page 16 of the USS brochure, when confronted with the bold red letters on page 16 relating to DOT regulations (Mattingly claimed he did not know prior to the accident that the DOT regulated the use of 3T cylinders), Mattingly stated: "No, I did not rely, no, there was any rules for the shipper. I didn't read all that brochure; still haven't." Mattingly went on to explain "I looked at all the pictures, I will say that." Finally, when pressed for an answer as to whether he did or did not read page 16 of the USS brochure, Mattingly confessed that he did not know.

The Sixth Circuit considered the entire USS brochure. It properly concluded that the testimony related to the brochure does not constitute sufficient evidence of reliance to justify submission of CGC's fraud claim to the jury.

III. The Sixth Circuit's Application Of Kentucky Law Creates No Conflict Among Federal Circuits That Apply The Laws Of Other States In Diversity Cases.

Contrary to CGC's argument, no reviewable conflict exists among the federal circuits as to what constitutes reliance as an element of a fraud claim in a diversity case. State law defines the substantive elements of the cause of action. 28 U.S.C. § 1652; *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938); *Fashion Originators Guild* v. *Federal T. Com.,* 312 U.S. 457 (1941). The Sixth Circuit correctly applied and specifically cited the Kentucky authority establishing the substantive law on which it decided this diversity case. (Appendix, pp. 8a, 10a-11a, 13a)

CGC does not argue that the Sixth Circuit incorrectly applied Kentucky law. Rather, CGC cites cases from other federal circuits applying the law of other states and argues that they demonstrate a reviewable conflict among the circuits. It is axiomatic and this Court has held that decisions by federal courts of appeals applying different laws of different states do not create reviewable conflicts among the circuits. *Ruhlin* v. *New York Life Ins. Co.,* 304 U.S. 202, 206 (1938). The Sixth Circuit's application of Kentucky law creates no conflict with the decisions of other federal appellate courts applying the laws of other states. CGC has presented no issue warranting a writ of certiorari.

IV. The Sixth Circuit Correctly Applied Kentucky Law Regarding Recovery Of Alleged Lost Profits.

A. Kentucky Law Requires Proof of Some Profitability.

The Sixth Circuit applying Kentucky law correctly held that CGC did not produce sufficient evidence of the fact that, absent the accident, CGC could have made a profit. As the Sixth Circuit pointed out at page 13 of its Opinion (Appendix, p. 15a) "Kentucky law requires that CGC establish the fact of lost profits with reasonable certainty. *Pauline's Chicken Villa, Inc.* v. *KFC Corp.*, 701 S.W. 2d 399, 401 (Ky. 1985)."

The court in *Pauline's* referred to nine factors existing in that case which eliminated the "uncertainty" of new business profitability. The Sixth Circuit listed the nine *Pauline's* factors and observed that Kentucky's highest court had removed "virtually all the uncertain variables" for determining the profitability test for a new business under Kentucky law. Contrary to CGC's allegations, the Sixth Circuit did not require that CGC prove all of the nine factors listed in *Pauline's*. Rather, the Sixth Circuit expressly stated that "[*n*]*ot one* of these factors existed in this case" (emphasis added). (Appendix, p. 15a).

CGC misunderstands Kentucky law when it argues that it can recover lost profits merely by offering evidence that USS and Kelley caused *some kind* of damage. That there was damage of some kind does not mean there was damage of a particular kind. One

of several possible kinds of damage is "lost profits". While it is true that the *amount* of lost profits need not be proven with certainty, the *fact* of lost profits still must be proven in accordance with Kentucky law. Kentucky law requires that CGC prove with *reasonable certainty* that USS and Kelley caused CGC to suffer *lost profits*. Consequently, CGC must prove with reasonable certainty that, absent the accident, it would have made profits.

B. Trial Evidence Established No Profitability.

In this case, the Sixth Circuit correctly held that CGC failed to introduce sufficient probative evidence that it would have made any profits. The evidence at trial established that:

(a) CGC never in its entire existence made a profit;

(b) CGC had a pre-accident operating history of less than ten days without any profit;

(c) no natural gas cylinder trailer transport operation anywhere ultimately returned a profit; and

(d) the only similar operation in the same geographic region discontinued operations because of economic infeasibility.

Moreover, CGC's only lost profits evidence came from its economist, Dr. Donald Monath, who merely subtracted CGC's pre-operational expense estimates from the projected maximum estimated revenues CGC could realize if it operated 24 hours a day, 365 days

a year for ten years. Dr. Monath made no investigation and offered no testimony regarding CGC's ability to meet its expense or income projections or realize any profits at all.

CGC's failure of proof is highlighted by the equivocation of Dr. Monath. He made no effort to determine whether CGC, absent the accident, could even have continued to operate. Dr. Monath had no information about how CGC created the pre-operational cost estimates or expectations on which he relied. Dr. Monath did not know the company had only a ten-day operating history or that CGC's management had no experience in the gas transport industry. Dr. Monath had no knowledge of the contaminated quality and inadequate quantity of CGC's product. He did not consider the negative financial history of other natural gas transporters.

Applying Kentucky law, the Sixth Circuit correctly found this evidence insufficient to submit the speculative issue of lost profits to the jury.

C. CGC's Citation to Unrelated Federal Statutes Does Not Alter the Kentucky Profitability Standard.

CGC's argument is not supported by its cited authorities. The federal question cases CGC cites involve claims under various federal statutes. They do not control this diversity case which is a common law tort case in which Kentucky's substantive law provides the rule of decision. Moreover, the standard applied in the cases CGC cites does not significantly differ from the Kentucky standard. Thus, the failure

of proof in this case supports the Sixth Circuit's holding under either standard. For example, the passage from *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) quoted at page 21 of CGC's Petition states in part:

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of amount."

282 U.S. at 562.

The party seeking lost profits must prove that "those damages," *i.e.*, the lost profits, resulted from the wrong. In this case, CGC did not sufficiently establish that it could have made any profit regardless of the accident. Therefore, irrespective of the law applied, the Sixth Circuit correctly decided that CGC failed to present sufficient evidence of lost profits to permit an instruction on the issue.

V. Congress Has The Authority To Pass A Law Fixing The Rate Of Post-Judgment Interest In Diversity Cases.

28 U.S.C. § 1961(a) sets the rate of interest on any money judgments in civil cases in U.S. District Courts. No exemption exists for diversity cases. Therefore, the statute governs the post-judgment interest rate in this case unless the provision is unconstitutional. *Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965); U.S. Const. Art.

VI, Cl. 2.[3] In finding the statute constitutional, the Court in *Weitz Co., Inc.* v. *Mo-Kan Carpet, Inc.*, 723 F. 2d 1382, 1386 (8th Cir. 1983) stated:

> Congress has the power, under Article III of the Constitution, to ordain and establish inferior federal courts, including this Court and the District Court which entered the judgment below. It has the power to pass all laws necessary and proper for the execution of powers specifically granted. The accrual of interest is an ordinary incident of judicial relief, and we think it clear that the power that creates the tribunal that enters the judgment can also provide for such ordinary incidents.
>
> The *Erie* doctrine does not require a different result. Even if the rate of interest that a judgment will bear is in some sense "substantive" in that it is a part of the damages recovered by the winning side, it is also easily susceptible of characterization as "procedural," since it has to do exclusively with events that occur after a dispute gets to court. The question of interest, therefore, is at most in "the uncertain area between substance and procedure," and rationally capable of classification as either. *Hanna* v. *Plumer, supra,* 380 U.S. at 472, 85 S. Ct. at 1144. It is therefore a subject with respect to which Congress has full power to legislate, even as to cases that get into the federal courts only because of diversity of citizenship.

See also, Nissho-Iwai Co. v. *Occidental Crude Sales, Inc.*, 848 F. 2d 613, 622-624 (5th Cir. 1988); *Everaard*

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[3]Because CGC has not complied with Rule 28(3)(b) of the U.S. Supreme Court Rules, it is assumed that CGC does not challenge the constitutionality of 28 U.S.C. § 1961(a).

v. *Hartfort Acc. and Indem. Co.*, 842 F. 2d 1186, 1193, 1194 (10th Cir. 1988); *G. M. Brod & Co.* v. *U.S. Home Corp.*, 759 F. 2d 1526, 1542 (11th Cir. 1985); *Bailey* v. *Chattem, Inc.*, 838 F. 2d 149, 152, 153 (6th Cir.), *cert. denied*, — U.S. —, 108 S. Ct. 2831 (1988); *Northrop Corp.* v. *Triad Intern. Marketing, S.A.*, 842 F. 2d 1154, 1155-1156 (9th Cir. 1988). These authorities specifically reject CGC's argument that 28 U.S.C. § 1961(a) violates the *Erie* doctrine and establish that CGC's argument has no merit.

CONCLUSION

CGC has presented no argument warranting a writ of certiorari. The Sixth Circuit's proper application of Kentucky law to this diversity case creates no unresolved constitutional questions nor any reviewable conflict among federal circuits. USS and Kelley respectfully request that this Court deny CGC's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT: WESTERN DISTRICT OF KENTUCKY
CASE TITLE: COMPRESSED GAS CORPORATION, INC. V. UNITED STATES STEEL CORPORATION JACK B. KELLEY CO., INC.	DOCKET NUMBER: 78-0063-0 (M) 78-0144-0 (M)
	NAME OF JUDGE OR MAGISTRATE: HON. RONALD E. MEREDITH

☒ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Compressed Gas Corporation is found not to be at fault.

Jack B. Kelley Co., Inc. and United States Steel Corporation are found to be at fault in the following proportions:

Jack B. Kelley Co., Inc.	30%
United States Steel Corporation	70%

Compressed Gas Corporation is awarded damages as follows:

Compressed Gas Corporation, Inc.-Indebtedness	$533,809.66
Post Accident Expenses Incurred-Balance	$45,307.54
Lost Profits	$1,137,154.00
Initial Investment	$50,000.00
TOTAL DAMAGES	$1,766,271.20

IT IS FURTHER ORDERED, based on the above findings, that judgment shall be entered in the amount of ONE MILLION TWO HUNDRED THIRTY SIX THOUSAND THREE HUNDRED EIGHTY NINE DOLLARS and EIGHTY FOUR CENTS($1,236,389.84) against the defendant, United States Steel Corporation and shall be entered in the amount of FIVE HUNDRED TWENTY NINE THOUSAND EIGHT HUNDRED EIGHTY ONE DOLLARS and THIRTY SIX CENTS($529,881.36) against the defendant, Jack B. Kelley Co., Inc. The plaintiff, Compressed Gas Corporation, Inc., shall recover a total sum of $1,766,271.20 as set forth above, with interest thereon at the rate of twelve (12) percent compounded annually from the date of entry of this judgment until paid, plus costs herein expended.

This is a final and appealable judgment, there being no just cause for delay.

ENTERED
DEC 17 1986
DATE
JESSE W. GRIDER, CLERK
BY DEPUTY CLERK

CLERK		
JESSE W. GRIDER		
(BY) DEPUTY CLERK		
NADINE C. SMITH	Nadine C. Smith	12-11-86

APPENDIX 2

Nos. 87-5535/87-5608

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COMPRESSED GAS CORPORATION, INC., - *Plaintiff-Appellee Cross-Appellant,*

v.

UNITED STATES STEEL CORPORATION and JACK B. KELLEY, INC., - - - *Defendants-Appellants Cross-Appellees.*

On Appeal From the United States District Court for the Western District of Kentucky
Decided and Filed September 21, 1988

Before: KEITH, KENNEDY and NELSON, Circuit Judges.

I.

KEITH, Circuit Judge. Defendants United States Steel Corporation ("USS") and Jack Kelley appeal, and plaintiff Compressed Gas Corporation ("CGC") cross-appeals, the jury verdict for plaintiff in this diversity action resulting from the explosion of a steel cylinder. The "3T" cylinder, manufactured by defendant USS and leased by defendant Jack B. Kelley, Inc., ("Kelley") ruptured while being filled with natural gas apparently containing certain contaminants. The explosion killed two persons, injured four others, and caused property damage. The personal injury

and wrongful death claims were adjudicated in a separate lawsuit. At trial in this action, CGC claimed that it had been defrauded by the misrepresentations of USS and Kelley that the cylinders were safe for transporting natural gas and approved for that purpose by the United States Department of Transportation ("DOT"). CGC also made a products liability claim for a defective cylinder and failure to warn. This appeal focuses on the property damage resulting to plaintiff CGC from the rupture of the cylinder.

For the reasons set forth below, we believe the jury was improperly permitted to find against USS and Kelley on a theory of fraudulent misrepresentation, and was also improperly permitted to include CGC's alleged "lost profits" in the damages award. Because the jury reached a damages verdict that apparently was calculated upon a theory of fraudulent misrepresentation, and which also incorporated CGC's alleged lost profits, the verdict against the defendants must be vacated. We must therefore reverse on those issues and remand the entire case to the district court for a new trial. Further, we believe that an incorrect rate of interest was applied to the judgment below. We affirm on all of the remaining issues.

This case was tried as a summary jury trial on February 13, 1985, which resulted in a verdict of $200,000 against defendants USS and Kelley. The case was then reassigned to the Honorable Ronald Meredith of the Western District of Kentucky, who allowed additional discovery. A full trial on the merits took place on October 21, 1986. On December 11, 1986, the jury returned a verdict, apportioning fault at 70% against USS and 30% against Kelley, and awarding $1,766,271.20 in damages to CGC. The district court set the post-judgment interest rate at 12% to be compounded annually. The district court denied USS's and Kelley's motions for judgment notwithstanding the verdict and new trial.

Defendants USS and Kelley present a host of issues on appeal. They urge: 1) that the absence of proof of fraudulent misrepresentation entitled them to a directed verdict on the question of whether they fraudulently induced CGC to lease their steel cylinders; 2) that the jury instructions impermissibly allowed a solitary instruction on damages for two separate theories of liability; 3) that there was insufficient evidence to support a jury instruction on lost profits; 4) that Kentucky law requires the application of contributory rather than comparative negligence to products liability cases; 5) that the trial court abused its discretion in allowing CGC to conduct additional discovery following the summary jury trial; 6) that the trial court erred in applying the 12% post-judgment interest rate; and 7) that CGC's agreement to indemnify Kelley from all liability arising from the use of leased cylinder trailers entitled Kelley to a directed verdict on claims against him. On cross-appeal, CGC argues that punitive damages should have been submitted to the jury.

II. FACTS

Gobel Mattingly, the retired owner of a highway construction company, incorporated CGC for the purpose of hauling natural gas from wells to commercial pipelines. A five-paragraph trade journal article describing the successful gas transportation operation of Texas Gas Transport ("Texas Gas") inspired Mattingly to enter the gas transportation business in August, 1976. When he incorporated CGC, Mattingly had no training or experience in gas transportation or compression. Joint Appendix at 927.

Mattingly visited Jack Kelley's Texas facilities to lease the special trailers that hauled the USS steel cylinders used in transporting natural gas. Kelley was one of four or five principal purchasers of USS seamless steel cylinders. He would purchase the cylinders from USS and fabricate

trailers for them. Each trailer could transport twelve cylinders. As well as using the trailers to transport a variety of compressed gases, Kelley sold or leased the cylinder trailers to others. Mattingly executed a trailer lease with Kelley in February, 1977.

On October 27, 1977, CGC's compressor station was damaged when a 3T seamless steel cylinder manufactured by USS ruptured while being filled with natural gas apparently tainted by the contaminants hydrogen sulfide and water. CGC repaired its property damage for $45,307.54.

The experts who testified at trial generally agreed that the explosion of the steel cylinder would not have occurred if hydrogen sulfide and water had not combined with natural gas in the cylinder. Natural gas is odorless and flammable, and is composed principally of methane. Sometimes natural gas, when extracted from the ground, contains contaminants such as hydrogen sulfide. Gas that does not contain significant hydrogen sulfide contamination is labeled "sweet" gas, while contaminated gas is called "sour" gas. In the gas industry, contaminated gas is considered dangerous because hydrogen sulfide in the presence of water will embrittle high-strength steel, causing it to fail under stress within hours. This is known in the industry as "sulfide stress cracking," and is recognized and understood. For sulfide stress cracking to occur, three factors must be present: hydrogen sulfide, water and susceptible metal. At the time of the accident CGC had neither installed a dehydrator nor any sulfide removal equipment at its gas wells, unlike most other gas well operations in the United States.

When Mattingly and Kelley met to arrange the lease of the 3T cylinders and trailers, Kelley testified that he told Mattingly that Mattingly's "gas can't have any moisture in it or no hydrogen sulfide." Joint Appendix at 800. Kelley testified that he repeated this warning to Mattingly during Mattingly's second visit to his offices. Mattingly testified

that "someone" had advised him that the gas had to be dry to be hauled safely in the 3T tubes, but he was not sure that that person was Kelley. *Id.* at 919. Mattingly saw a Kelley brochure which promoted the cylinder trailers, but never read the DOT regulations that were on the front of the brochure. In September, 1977, at CGC's request, Kelley sent Mattingly a copy of the DOT regulations setting forth the gases suitable for transport in 3T cylinders. Mattingly testified that again he did not read the regulations sent to him. *Id.* at 924.

Mattingly said that he showed Kelley an analysis of a gas well that indicated the gas was sweet. He did not, however, have the wells tested for hydrogen sulfide or moisture. *Id.* at 731. The test that he had showed Kelley was over a year old, and contained no moisture reading. Tests conducted on the wells following the accident revealed high concentrations of hydrogen sulfide and moisture. *Id.* at 615-16, 1043-45.

Aside from his three visits with Kelley, Mattingly's contacts with USS itself were scant. In September, 1976, while visiting the Kelley offices, Mattingly saw but did not read a USS brochure, and instead only "looked at the pictures." *Id.* at 924. In June of 1977, Mattingly saw an advertisement in the *Wall Street Journal* promoting USS cylinders for use in natural gas transportation. The advertisement gave no specific cylinder identification or detailed technical information, but gave a telephone number and invited inquiries from persons interested in further information. CGC never called the number in response to the advertisement.

Prior to the accident, neither USS nor Kelley ever had any complaints that, or knowledge that, any high pressure jumbo cylinder had ruptured in service. *Id.* at 983. As of the date of the accident, USS had produced over 15,000 jumbo steel cylinders. The 3T cylinder had transported

approximately 48,000 loads of natural gas without difficulty. According to testimony at trial, never in USS's history had one of its cylinders ruptured in any kind of service until the explosion at issue here. *Id.*

III. ANALYSIS

A. *The Fraud Claims*

CGC claims that USS and Kelley fraudulently induced CGC to use the 3T cylinders by "misrepresenting" the cylinders as safe containers for natural gas transportation, and by misrepresenting that the DOT regulations authorized natural gas transportation in 3T cylinders.

Under Kentucky law, which governs this diversity action, the plaintiff must establish six elements to sustain a fraud claim. There must be: 1) a material misrepresentation, 2) which is false, 3) which was known to be false, or made recklessly, 4) made with inducement to be acted upon, 5) which is acted upon in reliance thereon, and 6) causes injury. *Wahba* v. *Don Corlett Motors, Inc.*, 573 S.W. 2d 357, 359 (Ky. Ct. App. 1978). Kentucky law also recognizes a presumption of innocence and honesty against fraud claims. *Terrill* v. *Carpenter*, 143 F. Supp. 747, 753-54 (E.D. Ky. 1956), *aff'd*, 249 F. 2d 142 (6th Cir. 1957); *T.M. Crutcher Laboratory* v. *Crutcher*, 288 Ky. 709, 720, 157 S.W. 2d 314, 319 (1941). The plaintiff bears the burden of proving fraud by clear and convincing evidence. *Brooks* v. *United Kentucky Bank*, 659 S.W. 2d 213, 216 (Ky. Ct. App. 1983); *Wahba*, 573 S.W. 2d at 359; *Sanford Construction Co.* v. *S. & H. Contractors, Inc.*, 443 S.W. 2d 227 (Ky. 1969). Under Kentucky law, a motion for a judgment notwithstanding the verdict is subject to a "more than a scintilla" of evidence rule; that is, we will reverse the denial of a judgment notwithstanding the verdict if we do not find evidence of fraud of probative value having fitness to induce conviction in the minds of reasonable persons. *Wadkins'*

Adm'x v. *Chesapeake & Ohio Railway Co.*, 298 S.W. 2d 7, 9 (Ky. 1956). We find that plaintiff has not presented "more than a scintilla of evidence" toward meeting his burden of proof.

1. *No Material Misrepresentation Known to be False or Made Recklessly.* CGC argues that USS and Kelley falsely represented that the steel tubes were safe for "natural gas." Indeed, the main dispute between the parties appears to center around their conflicting definitions of the term "natural gas." CGC apparently defines "natural gas" as that which is extracted from wells in its natural state, without dehydration or without removal of hydrogen sulfide. In other words, CGC's definition is that of untreated natural gas, which may contain certain amounts of the contaminants at issue in this action.

USS and Kelley, on the other hand, defined "natural gas" as that which is suitable for transport in their steel tubes—i.e., non-corrosive, dry and sweet gas, absent contaminants. This dry gas, they claim, is "essentially methane." Indeed, prior to the accident in this case, defendants claim, the DOT and the industry had apparently used the terms "natural gas" and "methane" interchangably. The evidence shows that USS and Kelley were reasonable in their belief that "natural gas" and "methane" could be considered at the time to be virtual equivalents.

Kelley's operation produced a brochure which specified that 3T cylinders were "approved for several gases including Methane." Joint Appendix at 467. Kelley sent a copy of the DOT regulations to Mattingly—regulations which specified that the tubes were authorized to carry methane; in the cover letter to those regulations, William C. George of Kelley's firm wrote that "Part 173.302, Sub 3, of the Code authorizes the transportation of methane (natural gas) in 3-T tubes." Joint Appendix at 496-97. Kelley painted "METHANE" on the side of the cylinder trailers in

bold letters. In other words, Kelley's firm apparently used the terms interchangeably.

A less plausible interpretation of the same facts, and one that CGC would have us believe, is that Kelley somehow connived to make CGC think that methane and natural gas were one and the same, when he believed that this was not true. That version of events would have Kelley painting his trucks with the word "METHANE" even though he knew that they were to be used for transporting the less pure natural gas, and duping CGC into thinking that the DOT regulations were meant to cover natural gas as well as methane. The jury found CGC's story convincing, and we do not overturn their finding lightly. However, under Kentucky law, as we have stated above, there is a presumption of honesty against fraud claims. " 'In actions involving fraud . . . where the facts present a double aspect, one consistent with fair dealing and the other involving dishonesty of purpose, the court, unless the scale decidedly predominates for the latter, will strike the balance in favor of honesty and innocence.' " *T.M. Crutcher Laboratory,* 157 S.W. 2d at 319 (quoting *Pacific Mut. L. Ins. Co.* v. *Arnold,* 262 Ky. 267, 276, 90 S.W. 2d 44, 49 (1935)). There was no evidence proferred of duplicitous behavior or intent to deceive on the part of Kelley or Kelley's operation. We find that Kelley's meshing of "natural gas" and "methane" was more consistent with his honest belief that the terms were interchangeable than with any attempt to fraudulently conceal the truth.

The closest that plaintiff comes to proving fraud with respect to Kelley is the cover letter from Kelley's assistant traffic manager defining the two terms as one. A copy of the DOT regulations was sent to plaintiff with the letter. This representation, to the extent that it is a misrepresentation of law, is not actionable in Kentucky. *Fields* v. *Life & Casualty Co. of Tenn.,* 349 F. Supp. 612, 615 (E.D. Ky.

1972); *Mosley* v. *Owensboro Municipal Housing Comm'n.*, 252 S.W. 2d 880, 881 (Ky. 1952). Moreover, Mattingly did not even read the letter.

USS also used the terms "methane" and "natural gas" interchangeably, according to Peter G. Fairchock, Chief Metallurgist at the Christy Park Plant of USS. Joint Appendix at 1002. More importantly, however, the DOT used the terms interchangeably on a shipping permit, which recited:

2. COMMODITY. Natural Gas.
3. PROPER SHIPPING NAME (49 CFR 172.5) Methane.

The DOT also recognized that the industry was using the terms interchangeably, and, after the accident, promulgated a clarification which distinguished natural gas from methane, a primary component of natural gas. 43 Fed. Reg. 13,382 (1978) (to be codified at 49 C.F.R. § 173.302(a)).

While it is fairly clear in retrospect that it would be irresponsible in 1988 to use "natural gas" when what is really meant is pure methane, at the time of the accident, this was not the practice. Thus, we believe that in 1977, USS and Kelley properly represented the DOT's regulations as they reasonably interpreted them.[1]

As to the misrepresentations specifically made by USS, CGC claims basically that an advertisement in the *Wall*

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[1]The only indication that the DOT did not intend to permit 3T cylinders for natural gas transport came from a "preface" to a comment in a 1973 issue of the *Federal Register*, 38 Fed. Reg. 21,989 (1973). This preface appeared prior to the DOT's issuing the shipping permit mentioned above permitting 3T cylinders in natural gas service, and prior to the Texas Gas operation. In addition, the preface never became part of the regulations and was not published in the C.F.R. Prior to the accident, USS had no knowledge of the preface. Joint Appendix at 985.

Street Journal was sufficient to establish evidence of fraud. The advertisement generally promoted USS pressure cylinders for use in natural gas transportation. Joint Appendix at 535. The ad did not specifically identify any cylinders, and instead provided a telephone number to call for inquiries. CGC never contacted USS in response to the ad, and therefore received no representations about the cylinders. CGC also claims that USS misrepresented the use of the cylinders through a USS brochure that Mattingly saw in Kelley's offices. Yet, since he never read the brochure, Mattingly could not have gleaned any misrepresentations from it.

2. *No Reliance.* More striking, however, than the paucity of evidence showing any material misrepresentation is the absence of evidence of reliance. The proof offered at trial simply does not establish that Mattingly relied on statements made by USS or Kelley. Rather, Mattingly testified that he never read the brochures by USS or Kelley, nor did he telephone USS in response to the advertisement in the *Wall Street Journal.* Indeed, that article appeared after he had already committed himself to his new business venture. As defendants indicate in their brief, from September 1976 to April 1977, Mattingly incorporated CGC, obtained various quotes on compressor equipment, negotiated with potential buyers of his gas, entered into lease agreements for 3T cylinder trailers from Kelley, executed a contract giving him rights to various gas wells to be used in his operation, began making improvements to the road leading to the compressor site and began laying pipes to transport the gas from the wellheads to the compressor site. The *Wall Street Journal* article appeared months later.

Mattingly claims that he used the article to obtain a loan for his business. Although it is possible that the Small Business Administration may have relied on the advertise-

ment in granting Mattingly the loan (and there was no proof of this), that does not establish that *Mattingly* relied on the advertisement in using the 3T cylinders. In fact, the lease agreement for the cylinders was signed and completed a full four months before the advertisement appeared. Whether the Small Business Administration used the advertisement to grant a loan is irrelevant to the claim that USS fraudulently misrepresented the use of 3T cylinders to Mattingly. Kentucky law requires that the party claiming fraud show that he or she relied on the alleged misrepresentation, not a third party. *Wilson* v. *Henry*, 340 S.W. 2d 449, 451 (Ky. 1960).

Moreover, CGC never telephoned USS in response to the advertisement. It is difficult for us to imagine reliance on a fraudulent misrepresentation when the advertisement in question was non-specific, made no promises, and when CGC never even exhibited enough "reliance" on the ad to call the telephone number listed. CGC cannot now allege that *if* they *had* called the number, they *would have* relied on some hypothetical USS statement about the propensities of natural gas. Hypotheticals do not constitute reliance. Even so, every person who testified about having spoken with USS regarding the use of 3T cylinders for natural gas transportation acknowledged that USS specified that 3T cylinders were suitable only for sweet, dry gas.

An examination of the brochures that CGC claims also induced reliance supports our conclusion. These brochures are presentations of the various uses to which "seamless pressure vessels" (USS cylinders) can be put. *See* Joint Appendix at 468-95; *id.* at 565-78. Even assuming that it would have been reasonable to rely exclusively on the descriptions contained in these brochures, there is no basis to rely on them for the proposition that it was safe to transport natural gas in 3T cylinders. Rather, the brochures, under the heading of "description," state that "USS Seam-

less Pressure Vessels offer great inherent strength and reliability in handling hydrogen, nitrogen, air, helium, oxygen, and other gases." *Id.* at 472 and 567. The same list is repeated under "typical applications." *Id.* at 477 and 569. Thus, even if the brochures are seen as intended to have induced reliance, they could not reasonably have been relied on to transport natural gas without further inquiry.

As further evidence of reliance, Mattingly asserts in his brief that after the explosion, USS and Kelley continued to assure him that 3T tubes were safe for transporting natural gas and that he should resume his business. *Id.* at 914-15. Under Kentucky law, CGC must show that its reliance on the misrepresentation was the cause of the injury. The damages claimed by CGC cannot be attributable to USS's alleged *post*-explosion misrepresentation. Since CGC never resumed business, CGC could not have relied on USS's alleged assurances. In short, we are unimpressed by the evidence of fraudulent misrepresentation. Plaintiff cannot surmount the first two important hurdles in the test to establish fraud: i.e., that there was a misrepresentation, and that there was reliance. We need proceed no further in our inquiry on the fraud issue.

We therefore reverse with respect to the claim that USS and Kelley fraudulently misrepresented the use of the 3T steel tubes, and remand the case back to the district court with instructions to proceed solely on a negligence theory of liability. We recognize that this decision necessarily affects USS's and Kelley's claim on appeal that the jury instructions given at trial improperly mingled the damages theories as to fraud and negligence. Since on remand the case will be tried only on a negligence theory, there will be no need for an instruction as to the legal theory of fraudulent misrepresentation. A single damages instruction would therefore be acceptable under this singular theory of liability.

B. *Lost Profits Instruction*

The jury awarded CGC $1,137,154 in lost profits as a result of the cylinder explosion. Defendants USS and Kelley challenge the jury instruction on lost profits, claiming that such damages in this case fail for lack of the required certainty under Kentucky law. We agree.

Kentucky law requires that CGC establish the fact of lost profits with reasonable certainty. *Paulines Chicken Villa, Inc.* v. *KFC Corporation,* 701 S.W. 2d 399, 401 (Ky. 1985).[2] *See also Mitchell Coal Company* v. *United Mine Workers of America,* 313 F. 2d 78 (6th Cir. 1963), where this court held that the *Mitchell* plaintiff had not produced enough evidence of lost profits to take its claim to the jury. This court wrote:

> The [plaintiff] had been in business only a few months and had operated at a loss before the happening of the events complained of here. There was no showing that it could have operated at a profit. Even under the liberal rule in *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 the loss of profits must be established by at least a

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[2]The *Paulines* court set out in that case the facts that had removed "virtually all the uncertain variables":

> [1] This is a national franchisor, [2] with uniformity of national advertising, [3] uniform quality control, [4] earnings and expense figures on nearby and comparable locations, [5] and an available history concerning success and failure ratios. The franchisee, likewise, [6] is experienced in the field and with the specific product, with [7] a proven record of operation and management, [8] a history of profit and loss, [9] with two current operations in the general area, etc.

701 S.W. 2d at 401-402.

Not one of these nine factors exists in this case.

> reasonable probability and not on sheer speculation and guesswork.

Mitchell, 313 F. 2d at 79.

As defendants point out in their brief, CGC's claim for lost profits is speculative at best. The company was newly formed, in a relatively new industry, and dependant upon the unpredictable gas market at a time when there was an oil crisis. CGC operated only for a total of ten days and transported only eleven loads or partial loads of gas. It never made a profit. CGC had only one customer. Don Fowler, the president of Texas Gas, a gas transport operation 900 miles from CGC, testified that Texas Gas made little or no profit in its gas transport operation, Joint Appendix at 1066, 1978-80, and had never operated in Kentucky because it could not find gas wells of a quality and quantity sufficient to warrant the cost of establishing an operation. *Id.* at 1076. Thus, it would appear that CGC had little hope of making any profit, or of continuing in business at all.

CGC's proof of lost profits consisted of the testimony of Dr. Donald Monath, whose calculations were derived merely from subtracting CGC's estimated expense figures from the revenues CGC would realize if it operated at maximum capacity, 365 days a year for ten years. Monath concluded that CGC would have made $1,137,154 over ten years. *Id.* at 964. He made no effort to determine whether CGC in fact could make a profit or could continue to operate in the area. He was not informed as to how CGC developed its cost estimates, how long the company had operated, the nature of the product, or the level of CGC management's experience. *Id.* at 945, 968-71, 975. It is apparent to us that these figures were far too speculative to permit an instruction on lost profits. We therefore reverse with respect to this issue as well, holding that the evidence on lost profits was insufficient to warrant submitting that issue to the jury.

C. *Other Issues*

We assume, without deciding, that defendants did not waive the issue of the 12% post-judgment interest rate applied to their verdict by the district court. We believe that the district court incorrectly applied an interest rate in excess of the statutory mandate, and that on remand, the district court should be guided by 28 U.S.C. § 1961 in applying an interest rate to any verdict that may result from the new trial.

We have carefully reviewed the other claims on appeal and on cross-appeal, and are unable to conclude that they also constitute reversible error. We therefore affirm on the remaining issues.

III. CONCLUSION

For the reasons set forth above, we REVERSE on the issues of fraudulent misrepresentation and lost profits, and REMAND the case back to the district court for a new trial, to proceed on a negligence theory of liability only. We instruct the district court to apply the proper interest rate to the damages verdict, if any, on remand. The jury verdict below is VACATED. We AFFIRM on all remaining issues.

APPENDIX 3

No. 87-5535/5608

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COMPRESSED GAS CORPORATION, INC., - - - - - - - *Plaintiff-Appellee, Cross Appellant,*

v.

UNITED STATES STEEL CORPORATION and JACK B. KELLEY, INC., - - - *Defendants-Appellants, Cross Appellees.*

BEFORE: KEITH, KENNEDY and NELSON, Circuit Judges.

ORDER—Filed November 9, 1988

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk